

**DOMESTIC WORKERS IN CHINA: A COMPARATIVE
STUDY UTILISING
THE CAPABILITY APPROACH
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Abstract

Since the adoption of the International Labour Organisation (ILO) Domestic Workers Convention in 2011, there has been an increasing focus on the poor working conditions and standard of living of domestic workers in the world at large. Support for the advocacy of legal protection for domestic workers from governments and international organisations is also increasing. In contrast, although there are a large number of domestic workers in China and the domestic service industry is important to the development of the Chinese society, China has not provided domestic workers with adequate legal protection. The inadequate legal protection for domestic workers has resulted in the disadvantaged status of these workers and limited the development of the domestic service industry. This thesis reveals defects in the legislation applicable to domestic workers and provides corresponding legal reform recommendations.

The study examines the legal relationship between domestic workers and homeowners, and between domestic workers and domestic service companies. It reveals that domestic workers are excluded from the Chinese Labour Law and that there is no specific legislation on the protection of these workers. This thesis adopts the concept of “precarious work” to analyse the status of domestic workers in China. It reveals that the precarious status of domestic workers not only results from their inadequate legal protection but also from their demographic characteristics and the informality and temporality of domestic work. The capability approach provides a suitable theoretical framework to analyse the deficiencies in the legislation applicable to domestic workers in China because it supports the goal of protecting domestic workers and meets the requirement of understanding their demographic characteristics and the informality and temporality of domestic work. The analysis of the legislation on income, rest and social insurance of domestic workers from the perspective of the capability approach reveals that the legislation in China has not guaranteed their most basic capabilities. In order to change their precarious status, this thesis provides general recommendations on how China should develop legal protection for domestic workers and gives specific recommendations for the development of legal protection regarding their income, rest and social insurance.

Abbreviations

CNY	Chinese Yuan
RMB	Renminbi
ILO	International Labour Organisation
ILC	International Labour Conference
PRC	the People's Republic of China
NPC	National People's Congress of China
GDP	Gross Domestic Product
HRS	Household Registration System

I Chapter 1 Introduction

The contribution of domestic workers comprises a significant sector of the informal economy of many countries, including China. However, due to the particular nature of domestic work, its low social status, the demographic characteristics of its workforce, and the legacy of societal tradition relating to its practice, this work is poorly regulated and subject to sometimes extreme precarity. Despite engaging a significant sector of the working population and generating considerable contributions to nations' GDP,¹ domestic work tends to be excluded in terms of standard economic measurements and generally excluded from formal recognition in national accounts. Domestic work is commonly undervalued and largely “invisible”, and often excluded from the protections of other workplace legislation; these factors exacerbate its precarious status.²

The primary objectives of this thesis are as follows: to present an analysis of the current status of domestic work in China, and to identify lacunae and insufficiencies in current Chinese legislation relating to domestic work in that country; to determine the nature of existing barriers that have inhibited the development of effective regulatory protections of workers in the domestic services industry; and to propose an alternative direction for the development of effective legislation for domestic workers in China that will address their precarious status.

The definition of “domestic work” utilised by the International Labour Organization (ILO) and promoted in its various promulgations states that it is “work performed in or for a household or households”,³ and which is defined in terms of its relationship to the workplace in which it is performed, ie. the private household. This definition proposes that while the specific occupations and tasks undertaken differ in the contexts of different countries, domestic workers globally share common characteristics: “they may cook, clean, take care of

¹ Marilyn Waring *Counting for nothing: What men value and what women are worth* (University of Toronto Press, 1999)

² Ibid.

³ C189 - Domestic Workers Convention, 2011 (No. 189), Geneva, 100th ILC session, 16 Jun 2011.

children, the elderly and the disabled, attend to the garden or pets, or drive the family car. They may work part-time, full-time or on an hourly basis, and may live in the home of the employer or not”.⁴ This thesis critiques the ILO definition of “domestic worker” as it is applied in the context of China, and proposes an alternative definition. The research presents ways in which Chinese employment law could be changed and enhanced in order to extend labour rights and other legislative protection to this vulnerable sector of the workforce. The research identifies the general and particular characteristics pertaining to domestic work as it is conducted in China, provides a comprehensive analysis of the current legislative precarity of domestic workers in China, and proposes legal reform recommendations to counteract the precarious status of this category of work.

In conducting its analysis and proposing solutions, the thesis applies the tenets of the capability approach, a theoretical concept initially proposed by Indian economist and philosopher Amartya Sen.⁵ The capability approach emphasises the achievement of human well-being, focusing on the enablement of workers to attain freedom to achieve their potential for “human flourishing”, and concentrates on a “the freedom to achieve in general and the capabilities to function in particular”.⁶

The research engages a range of methods including document analysis and textual assessment of a broad range of relevant legislative and executive promulgations relating to domestic work conditions and regulation. A combination of the doctrinal and social legal approaches are employed in the research.

⁴ ILO website, <https://www.ilo.org/global/topics/care-economy/domestic-workers/lang--en/index.htm>

⁵ Amartya Sen *Equality of What?* The Tanner Lecture on Human Values (Stanford University, 1979)

⁶ Amartya Sen “Gender Inequality and Theories of Justice” in Martha C. Nussbaum and Jonathan Glover (eds) *Women, Culture, and Development: A Study of Human Capabilities* (Oxford University Press, United States, 1995) 259-273, at 266.

A *The emergence of the research topic*

Worldwide, many workers suffer from precarious and unpredictable working conditions. The global financial, economic and social crises, particularly those that have come about after 2007, have contributed to extending and intensifying the use of precarious work.⁷ The ILO estimates that only a quarter of workers are on permanent contracts, and the numbers in middle and low-income countries are even lower, representing only 13.7 per cent and 5.3 per cent respectively.⁸ The shift from permanent, full-time and formal employment relationships to temporary, part-time and informal forms of employment is in many cases associated with the rise in inequality and poverty rates in many countries.⁹

While there is an increasing focus on precarious work conditions in western countries through local governments and by international organisations' advocacy,¹⁰ the problem of precarious work has received little attention in China.¹¹ In China, precarious work was relatively rare until the 1980s, due to the prominence of state enterprises.¹² The shift toward a more market-based economy has led to rapid growth over the past three decades in precarious employment in both the formal and informal sectors of the economy.¹³ As with precarious work in other countries, there is substantial evidence that those engaging in such work are plagued by a

⁷ Bureau for Workers' Activities International Labour Office *From precarious work to decent work: outcome document to the workers' symposium on policies and regulations to combat precarious employment* (ILO, Geneva, 2012), at 30 ; Sam Caldbick and others "Globalization and the rise of precarious employment: the new frontier for workplace health promotion" 2014 21(2) *Global health promotion*, at 23.

⁸ International Labour Office *World employment and social outlook 2015: The changing nature of jobs* (Geneva, 2015), at 31.

⁹ *Ibid* at 39 – 40.

¹⁰ International Labour Office, above n 7, at 5 to 8.

¹¹ Chenxi Jiang "中国农民工的人权保护——以减少不稳定工作为视角" (Master's Thesis, Jilin University, 2014) (The Human Right Protection of China's Rural Migrant Workers: from the perspective of Curbing Precarious Work), at 6.

¹² Chapter 3 will introduce the employment patterns before the economic reform in the late 1970s in China.

¹³ Arne L Kalleberg and Kevin Hewison "Precarious Work and the Challenge for Asia" 2013 57(3) *American Behavioral Scientist* 271, at 282.

number of problems, including low pay, high work intensity, poor working conditions, and lack of employment protection.¹⁴

Many factors can contribute to work precariousness. Precariousness can in particular be created by legislation.¹⁵ In China, one group of workers who suffers legislative precariousness is domestic workers. The precariousness of these workers comes from *inter alia* their demographic characteristics but also, more importantly, from incomplete legislation. Domestic workers are still excluded from the Chinese Labour Law (CLL)¹⁶ and there is no specific legislation on the protection of these workers. Consequently, their work is characterised by its precarity.

Existing literature reveals that domestic workers are usually excluded or partly excluded from national labour protection law.¹⁷ For example, in the ILO's book *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection* reveal that only a one-tenth of all domestic workers in the world were covered by national labour legislation on the same footing as other workers in 2010.¹⁸ The lack of labour protections for domestic workers, such as no limitation on their normal weekly hours of work, extremely low wages and no maternity protection, has increased their precarity.¹⁹

¹⁴ Ibid at 283.

¹⁵ Virginia Mantouvalou "Human rights for precarious workers: the legislative precariousness of domestic labor" 2012 34 Comp. Lab. L. & Pol'y J., at 133.

¹⁶ The Labour Law of the PRC (中华人民共和国劳动法), 05 July 1994, entered into force 01 January 1995, available at http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004622.htm.

¹⁷ ILO *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection* (ILO, Geneva, 2013); Lisa Diaz-Ordaz "Real Work: Domestic Workers' Exclusion from the Protections of Labor Laws" 2010 19 Buff. J. Gender L. & Soc. Pol'y; Harmony Goldberg *The Long Journey Home: the Contested Exclusion and Inclusion of Domestic Workers from Federal Wage and Hour Protections in the United States* (International Labour Organization, 2015); Alice Huling "Domestic Workers in Malaysia: Hidden Victims of Abuse and Forced Labor" 2011 44 NYUJ Int'l L. & Pol.

¹⁸ ILO, above n 1.

¹⁹ Ibid.

Even in places where domestic workers are in principle covered by national labour legislation, they might lack effective protection in practice. The difficulty of implementing labour inspection in household workplaces can affect the enforcement of legal protection for domestic workers negatively.²⁰ For example, in the *Pitfalls of Home: Protecting the Health and Safety of Paid Domestic Workers*, Peggie Smith notes that it is difficult to monitor the enforcement of labour protections for domestic workers because households fall outside the reach of labour inspection.²¹

The migration status of domestic workers can also affect negatively the enforcement of their legal protection.²² For example, Nisha Varia reveals that domestic workers hesitate to use complaints procedures against abusive labour practices, such as delay or non-payment of wages, and violations of their rights, such as verbal, physical, or sexual violence as a result of the link between their legal residency and their employment relationship with their employer.²³ Similarly, in the *Precariousness and Capabilities: Migrant Care/domestic Workers in Two Institutional Contexts*, Barbara Hobson and Luwam Bede conclude that in the domestic service industry in Sweden and Spain, migrant workers are more likely to have informal contracts and lower job quality, pay and work conditions.²⁴

Problems facing domestic workers in other countries may also exist in China or emerge in the future. Therefore, these studies can contribute to the identification of problems facing domestic workers in China and the development of solutions to these problems. However,

²⁰ José Maria Ramirez-Machado “Domestic work, conditions of work and employment: A legal perspective” 2003 7 *Conditions of Work and Employment Series*; Peggie R Smith “Aging and caring in the home: Regulating paid domesticity in the twenty-first century” 2006 92 *Iowa L. Rev.*

²¹ Smith, above n 4.

²² Virginia Mantouvalou, above n 15; Ramirez-Machado, above n 4; Sandra Wallman and Tomoko Hayakawa “THE CAPABILITY OF CONTEXT: Activism and Resignation among Filipino Domestic Workers in London” 2016 64(3) *Slovak Ethnology/Slovensky Narodopis*; Carol Pier *United States: Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States* (Human Rights Watch, 2001).

²³ Nisha Varia ““Sweeping changes?” A review of recent reforms on protections for migrant domestic workers in Asia and the Middle East” 2011 23(1) *Canadian Journal of Women and the Law*.

²⁴ Barbara Hobson and Luwam Bede “Precariousness and capabilities: Migrant care/domestic workers in two institutional contexts” 2015 52(3) *Teorija in Praksa*.

different countries have different social contexts. The unique social context of Chinese society and the special characteristics of its domestic service industry mean that problems facing domestic workers in China can be different from problems facing domestic workers in other countries. For example, while a large proportion of domestic workers, especially developed countries, are migrant workers from other countries, migrant domestic workers in China are internal migrant workers.²⁵ It means that although there are small differences regarding culture, dialect and lifestyle between internal migrant domestic workers and homeowners, these workers do not have a language barrier and do not need to face visa-related issues, such as being forced to work because they are afraid of being deported. Therefore, studies on domestic workers in other countries cannot capture all the problems facing domestic workers in China.

A review of the literature on legal protection for domestic workers in China revealed that legal research is still limited in three broad areas. First, the scope of the research on the legal protection of domestic workers has not explored all problems facing domestic workers. For example, regarding the income of domestic workers, while existing studies have explored their lack of minimum wage and their vulnerability to illegal wage deduction and proposed legal reform recommendation to address these two problems, the research on the overtime wage of domestic workers is still largely ignored.²⁶ Similarly, regarding the rest period of domestic workers, existing research focuses on working hours and weekly or monthly days off, while the legal and non-legal factors that contribute to the lack of paid annual leave for domestic workers is unexplored.²⁷ The lack of a full cover of problems facing domestic

²⁵ See chapter 2.

²⁶ See Hongfang Wang “非正规就业--家政服务员权益问题研究” 2006 12(2) Journal of Chongqing University (Social Science Edition) (Informal Employment — Protection of Domestic Workers); Yawen Li “家政工劳动权益保护分析” 2011(7) Business Culture (Labour Protection for Domestic Workers in China); Dawu Hu “我国发达地区家政服务员劳动权益保障的法律思考” 2011 128(5-6) Journal of Henan Administrative Institute of Politics and Law 135 (Analysis of the Legal Protection for Domestic Workers in Developed Regions in China).

²⁷ See Zhuqing Wang “家政工劳动权益保护立法的必要性研究” 2010 26(1) Journal of University of Science and Technology Beijing (Social Sciences Edition) (The Necessity of Developing Legal Protection for Domestic Workers); Minghui Liu “家政工获得劳动保障权利的障碍及路径” 2011 32(5) Journal of Southwest Minzu University (Humanities and Social Science) (Channel and Obstacle for Domestic Workers to Obtain Labour Protection); Yulan

workers do not benefit the development of comprehensive legal protection for domestic workers.

Secondly, existing literature has not pinpointed the connection between all problems facing domestic workers and the defects in the legislation. For example, in the Research on the Necessity of Developing Legal Protection for Domestic Workers, Zhuqing Wang argues that the lack of labour protections for domestic workers has contributed to their problems, such as low income, inadequate rest periods and lack of access to obtain social insurance plans.²⁸ However, she has not analysed the specific connection between problems facing domestic workers and legislation. Existing studies thus have not revealed all inadequacies in the legislation applicable to domestic workers.²⁹

Thirdly, most of the existing literature only argues the necessity of developing legal protection for domestic workers while has not proposed detailed recommendations to address the disadvantaged status of domestic workers. For example, in the Research on Legal Relationships in the Domestic Service Industry and the Legal Protection for Domestic Workers, Tao Huang argues that China should develop legislation to protect domestic workers.³⁰ However, it has not analysed how China could achieve these such an objective. Similarly, in the Transcending Principles of Employment Contract and Labour Contract -- the Development of Institution for Domestic Workers, Zengyi Xie recommends that China should develop legal protection for domestic workers to ensure their dignity, to provide them with a

Xiang “浅论家政服务业妇女权益保护” 2010(5) Journal of Foshan University (Social Science Edition) (On the Protection of the Rights of Female Housekeepers); Dawu Hu “家政工人休息时间的法治化” 2013(1) Social Science Journal (Legalisation on Working Hours of Domestic Workers)

²⁸ Wang, above n 27.

²⁹ Other examples, see Xiaoli Liu “论我国家政工劳动权益保护的立法选择” (Master's thesis, Huaqiao University, 2013) (Research on the Legislation Choice for the Development of Rights Protection for Domestic Workers in China); Haiyan Yang “家政服务业发展困境及其突破路径” 2013(5) Reform and Development (Predicament of the Development of the Domestic Service Industry and Solutions).

³⁰ Tao Huang “家政服务业用工关系与家政工权益的法律保护” 2011 21(4) Journal of University of Jinan (Social Science Edition) (Legal Relationships in the Domestic Service Industry and Legal Protection for Domestic Workers)

decent working condition, to ensure their most basic labour and social protection, to protect domestic from unfair dismissal, and give domestic workers access to justice.³¹ However, he has not provided specific recommendations for achieving these goals. Although these studies prove the necessity of developing legal protection for domestic workers, the lack of specific recommendation limits their function on improving the precarious status of domestic workers.³²

Finally, the analysis of the practicality of legal reform recommendation lacks in most of the existing studies on the protection of domestic workers. For example, in the Research on Informal Employment: Legal Rights of Domestic Workers, Hongfang Wang argues that, in order to give domestic workers equal legal protection with formal employees, China should include domestic workers in the existing labour protection law.³³ Similarly, in the Protection Mechanism of Labour Rights of Domestic Workers, Yi Hao and Zhaihua Wang argue that in order to give domestic workers the access to social insurance plans, China should give domestic workers the right to buy social insurance plans as other employees.³⁴ However, it has not analysed if requiring homeowners to pay social insurance for domestic workers is practical.³⁵ As will be discussed in Chapter five, improving the precarious status requires more than giving domestic workers legal rights, but also ensuring the practicality of enforcing the

³¹ Zengyi Xie “超越雇佣合同与劳动合同规则——家政工保护的立法理念与制度建构” 2012 6(6) Tsinghua Law Journal (Transcending Principles of Employment Contract and Labour contract -- the Development of Institution for Domestic Workers).

³² Other examples, see Wang, above n 26.

³³ Ibid.

³⁴ Yi Hao and Zhaihua Wang “家政工人劳动权益的保护机制研究” 2016(24) China Labor (Protection Mechanism for Labour Rights of Domestic Workers).

³⁵ Other examples, see Yongkui Luan, Shengnan Huang and Zhigang Wang “家政服务人员的从业现状, 存在问题及解决对策研究——基于北京和河北的调查分析” 2012(06S) China Collective Economy (Research on Employment Situation of Domestic workers and Solutions for Problems Facing Domestic Workers: Based on a Survey of Domestic Workers in Beijing and Hebei Province); Rongmei Chen “走出家政工权益保护的法律困境” 2010 32(5) Journal of Yichun College (Improvement of the Inadequate Legal Protection for domestic workers); Mingjun Mi “家政工人权利保护的多元制度模式构想” 2011(5) Journal of Southwest Minzu University (Humanities and Social Science) (Research on the Establishment of Comprehensive Legal Protection for Domestic Workers).

legal rights. Lack of analysis of the practicality of the proposed legal reform does not contribute to the development of legal protection that can be enforced in practice.

In order to fill these gaps, this research provides a comprehensive analysis of the legal and regulatory factors that contribute to the precarious status of domestic workers in China and proposes legal reform recommendations to improve their precarious status.

B Research objectives

The overall objective of the research is to provide legal reform recommendations to improve the precarious status of domestic workers in China. This thesis also aims to look at subsidiary objectives. In particular, it seeks to explain who are domestic workers in China and why China should provide domestic workers with adequate legal protection. Moreover, this thesis identifies the applicable legislation of domestic workers in the Chinese legal system, with a view to revealing the inadequacy of the legislation in terms of the protection of domestic workers. Furthermore, this thesis explores what manifestations of the precarious status of domestic workers in China are. Finally, the thesis explains why China should not apply the Chinese Labour Law to protect domestic workers but should develop a specific law for them. On this basis, the thesis will provide a series of recommendations.

C The importance of giving domestic workers in China adequate legal protection

According to the Chinese Department of Trade in Services and Commercial Services' Report on Domestic Service Industry in China, there were 25.42 million domestic workers in China in 2017.³⁶ The total amount of workers in China was 776.4 million in 2017.³⁷ It means that

³⁶ Report on Development of the Domestic Service Industry in China in 2017(中国家政服务行业发展报告 2017), Department of Trade in Services and Commercial Services in the Ministry of Commerce of China, August 2017, at 2. Available at <http://images.mofcom.gov.cn/fms/201708/20170824160026338.pdf>.

³⁷ Official website of the National Bureau of Statistics of China, <http://data.stats.gov.cn/easyquery.htm?cn=C01>.

domestic workers made of more than three per cent of workers in China. Given that it is a characteristic of domestic work that many such workers are usually undocumented or unregistered, the actual number of domestic workers in China could be even higher. The efficacy of legal protections of domestic workers contributes significantly to the standard of living of this large group of workers.

Moreover, the provision of sufficient legal protection to domestic workers also benefits the healthy development of the domestic service industry. The following section explains that while the domestic service industry is of great importance to the development of Chinese society, problems in the industry have hindered its function. The section further argues that inadequate legal protection for domestic workers in China is a fundamental causal factor underlying the problems in the domestic service industry in that country.

The domestic work industry has become an important part of the life of many people in China over the past 40 years. Domestic work has become not only increasingly popular but also increasingly professional.³⁸ Changes in the country's planned economy to a market-based economy and a general improvement in citizens' quality of life have resulted in the formation of the large-scale domestic service industry.³⁹ After the implementation of the country's policy of Reform and Opening-Up in 1978, people's lifestyle has changed.⁴⁰ After private services, such as paid domestic service, become openly available in society, the increased GDP and the emergence of financial affluence in general has made many people in China want to free themselves from household chores.⁴¹ As a result, the domestic work industry has started to emerge as a major industry in China.

³⁸ Yanmei Li “我国家政服务业的现状分析与规范化建设” 2008(7) *Social Scientist* (Analysis of the Existing Problems in the Domestic Service Industry) at 107.

³⁹ *Ibid*, at 107.

⁴⁰ Jinglin He “中国城市家政服务业发展面临的问题与对策” 2014(1) *Hubei Social Sciences* (Problems in the Domestic Service Industry in China and Recommendations), at 86.

⁴¹ *Ibid*, at 86.

The steady increase in demand for domestic workers has promoted the rapid expansion of the domestic service industry.⁴² The prevalence of dual-earner families means that family members now have to work full-time.⁴³ Therefore, many families do not have enough time to tend to their domestic tasks such as cleaning, cooking and caring for their children. Moreover, the impacts of demographic changes in recent decades have increased the burden of looking after elderly parents, aggregating the demand on workers' time.⁴⁴ Traditionally, in Chinese society, children take care of their parents when they become old. It is usual nowadays for a couple to be responsible for looking after four aged parents. Increasing longevity of the population in general and increasing standard of living expectations of the elderly are also significant factors. The pressure on time has become more important because there are no siblings to share the care with due to the implementation, 30 years ago, of the "One-child Policy" in China, as well as the country's imperfect social security system.⁴⁵

The end of the "One-child Policy" announced by the Chinese government in 2015 to relieve the pressure of the ageing population, has further contributed to boosting the increasing demand for domestic workers. All couples are now allowed to have two children.⁴⁶ Consequently, the number of births in China has increased from 16.55 million in 2015 to

⁴² Li, above n 38, at 107.

⁴³ According to the China Family Development Report 2015, which is published by the National Health and Family Planning Commission in May 2015, the proportion of dual-earner families among married couples in China is 77.6 per cent. See Family Department of the National Health and Family Planning Commission of China *中国家庭发展报告 2015* (China Population Publishing House, Beijing, 2015) (Chinese Family Development Report 2015).

⁴⁴ Tingting Hu and Ming Cai "武汉市家政服务行业现状、问题及对策思考" 2008(7) Journal of Hubei University of Economics (Humanities and Social Sciences) (Current Situation of the Domestic Service Industry in Wuhan City and Corresponding Solutions), at 65.

⁴⁵ He, above n 40, at 86.

⁴⁶ The Central Committee of the Communist Party of China's Recommendations for the 13th Five-Year Plan for Economic and Social Development (中共中央关于制定国民经济和社会发展第十三个五年规划的建议), the Fifth Plenary Session of the 18th Communist Party of China Central Committee, 26 October 2015.

17.86 in 2016⁴⁷ and 17.23 in 2017.⁴⁸ The increased number of births has led to the high demand for domestic workers, especially those who are specialised in caring for new mothers and newborns.⁴⁹

Improvements in the average standard of living over recent decades have further resulted in increased demand for high-quality domestic services and the provision of a wider range of types of domestic work.⁵⁰ As people's standard of living keeps rising, the requirement for domestic work also becomes higher. There is also an increasing demand for diverse domestic services beyond the traditional domestic work of cooking, cleaning and caring.⁵¹ Specialised domestic services involving specific occupational skills, such as household management and children's education, are in high demand from some homeowners.⁵² The quality of domestic work is also increasingly being valued by households. For example, now homeowners not only require that food prepared by domestic workers is safe and tasty, but also that the food is nutritious and healthy.⁵³

⁴⁷ Statistical Communiqué of the PRC on the 2016 National Economic and Social Development (中华人民共和国2016年国民经济和社会发展统计公报), National Bureau of Statistics of China, February 28, 2017, available at: http://wap.stats.gov.cn/fb/201702/t20170228_1467496.html.

⁴⁸ Statistical Communiqué of the PRC on the 2017 National Economic and Social Development (中华人民共和国2017年国民经济和社会发展统计公报), National Bureau of Statistics of China, February 28, 2018, available at: http://www.stats.gov.cn/tjsj/zxfb/201802/t20180228_1585631.html.

⁴⁹ Xiaoxia Ou and others “普遍二孩政策下月嫂市场现状调查及对策研究——以广州天河区街道为例” 2017(27) Technology and Economic Guide (Survey of the Confinement Nanny Market after China abolish the One-child Policy: an Example of the Tianhenan Area in Guangzhou).

⁵⁰ Yanmei Li “规范家政服务业的有关思考” 2008(5) Theoretical Exploration (Ideas on the Standardisation of the Domestic Service Industry), at 106.

⁵¹ Ibid, at 106; Shuhai Zhao and others “北京家政服务业的现状及其规范性发展” 2010(57) Review of Economic Research (Current Situation and Standardisation of the Domestic Service Industry in Beijing), at 41; Shumin Xue “我国家政行业发展现状、问题及建议——以山东聊城市为例” 2012(a12) People's Tribune (The Current Level of Development of the Domestic Service Industry in China: take Liaocheng City in Shandong Province as an Example).

⁵² Li, above n 50 at 106.

⁵³ Xueyuan Du and Jinhua Chen “浅析家政职业教育的时代需要” 2010 30(7) Adult Education (Demand for Domestic Service Education in China), at 9 -10.

1 The importance of domestic work in Chinese society

In the context of the increasing demand for domestic services, especially that of high-quality domestic services, the domestic service market is growing fast.⁵⁴ Domestic work therefore not only participates to the quality of life of homeowners and domestic workers, but it also contributes to the development of Chinese society as a whole. In particular, this section next explains how a healthy domestic service industry in China can promote economic growth, optimise the industrial structure, and create employment opportunities in China.

(a) Promoting economic development

The development of the domestic service industry can generate a new green growth point for the Chinese economy because of its development potential and its environmentally friendly characteristics. Against the background of a stagnant global economic situation, the economic development in China is also slowing down. The annual GDP growth rate at 6.7 per cent in 2016 was the lowest since 1990.⁵⁵ The uncertain domestic and global economic situation is increasing the pressure on the government to achieve its annual economic growth target, which is higher than 6.5 per cent in the next five years.⁵⁶

In this context, the domestic service industry has the potential to be a new economic growth point because of its steadily increasing scale. As mentioned at the beginning of this section, the increased demand for domestic services has promoted the rapid expansion of the industry. According to the estimate of the Ministry of Commerce, the annual gross operating revenue of domestic service companies were 349.8 billion yuan in 2016, which had increased by 82.19

⁵⁴ Shaojun Huang *服务业与经济增长* (Economic Science Press, Beijing, 2000) (The Service Industry and the Growth of Economy), at 50-60; He, above n 40, at 87.

⁵⁵ Website of the National Bureau of Statistics of China, available at <http://data.stats.gov.cn/english/easyquery.htm?cn=C01>

⁵⁶ Outline of the 13th Five-Year Plan for the National Economic and Social Development of the PRC (中华人民共和国国民经济和社会发展第十三个五年规划纲要), March 2016, available at: <http://www.ndrc.gov.cn/gzdt/201603/P020160318576353824805.pdf>

per cent from 2013.⁵⁷ The scale of the domestic service industry will continue to grow because of the increasing demand for domestic services, especially high-quality domestic services.⁵⁸ The Report on the Domestic Service Industry in China estimates that there will be 50 million domestic workers in 2035.⁵⁹ The industry in China is thus considered as a “sunrise industry”, which is growing fast and is expected to become more important in the future.⁶⁰

The development of the domestic service industry moreover matches the requirement for developing a green economy in China. Commitment to a green economy is not only a necessary measure to address domestic pollution but it also represents a Chinese commitment to international obligation. In the 13th Five-Year Plan, which is the latest guideline for national development from 2016 to 2020, China clarifies that it will commit to the development of a green economy, reduction of carbon emissions, and prevention and treatment of pollution.⁶¹ Moreover, China has signed international conventions to peak its CO₂ emissions by 2025 and cut down on emission after that.⁶²

The domestic service industry meets the requirements of low pollution and low energy consumption. Although the development of the service industry also has an impact on the environment and natural resources, the negative influence on natural resources and environment which result from the development of this services sector is generally less than

⁵⁷ Report on Development of the Domestic Service Industry in China in 2017, above n 36. According to this report, the annual gross operating revenue of domestic service companies in 2013 is 192 billion yuan.

⁵⁸ Rong Mo 中国家政服务业发展报告 2018 (China Labour and Social Protection Press, Beijing, 2018) (Development Report of the Domestic Service Industry in China 2018)

⁵⁹ Ibid.

⁶⁰ Aiping Li and Liyan Bao “家政服务业发展的困境及路径选择——以山西省为例” 2010(12) Productivity Research (Obstacles in the Development of the Domestic Service Industry in China: Take Shanxi Province as an Example), at 185; Yang, above n 29, at 84

⁶¹ Outline of the 13th Five-Year Plan for the National Economic and Social Development of the PRC(中华人民共和国国民经济和社会发展第十三个五年规划纲要), March 2016, available at: <http://www.ndrc.gov.cn/gzdt/201603/P020160318576353824805.pdf>

⁶² Enhanced Actions on Climate Change: China's Intended Nationally Determined Contributions, Department of Climate Change, National Development and Reform Commission of China, 30 June 2015

the negative influence which results from developing the secondary sector.⁶³ In addition to the advantages of low resource consumption and low emissions, domestic service has an even smaller impact on the environment as it does not require extra resources and does not produce any more waste than a household usually consumes and produces. Therefore, developing the domestic service industry can not only provide a new economic growth point but also matches the requirements of a green economy.

(b) Optimising industrial structure

The development of domestic work service is in line with the government's plan of encouraging the development of the service sector. According to the Three-Sector Theory, economies are divided into three sectors of activity: primary, which involves the retrieval and production of raw materials; secondary, which involves the transformation of raw or intermediate materials into goods; and tertiary, which involves the supplying of services to consumers and businesses.⁶⁴ Developed economies usually display a high percentage in the tertiary sector.⁶⁵

China is currently undergoing a transition from a secondary sector based economy to a tertiary sector based: the proportion of the tertiary sector has increased from 46.7 per cent in 2013 to 51.6 per cent in 2017.⁶⁶ However, the percentage of the service sector in China is still lower than in most industrialised countries and major developing countries. According to statistics issued by the World Bank, the services sector accounted for 51.6 per cent of GDP in China in 2017, while the world average was 65.1 per cent in 2017.⁶⁷ The share of China's services sectors is not only less than major industrialised countries, such as the United States of

⁶³ Donghua Lin "生态环境与第三产业" 2001(2) Ecological Economy (Chinese Edition) (Ecological Environment and Tertiary Industry), at 22.

⁶⁴ Allan GB Fisher "Production, primary, secondary and tertiary" 1939 15(1) Economic record.

⁶⁵ BB Bhattacharya and Arup Mitra "Changing composition of employment in tertiary sector: a cross-country analysis" 1997 Economic and Political Weekly.

⁶⁶ Statistical Communiqué of the People's Republic of China on the 2017 National Economic and Social Development, above n 48.

⁶⁷ Statistics from the website of the World Bank, available at: <http://wdi.worldbank.org/table/4.2>.

America (77 per cent in 2017), the United Kingdom (70.1 per cent in 2017) and France (70.2 per cent in 2014), but also less than developing countries such as Brazil (63.1 per cent in 2017), Argentina (56.9 per cent in 2017), and South Africa (61.5 per cent in 2014).⁶⁸

The manufacturing and investment-oriented development model for developing the economy in China has affected the continuity of sustainable development.⁶⁹ The current economic structure that relies on manufacturing and investment has resulted in the depletion of resources and severe environmental pollution.⁷⁰ As a result of these problems, optimising the economic structure by increasing the proportion of the services sector has recently been implemented by the Chinese government.⁷¹ In addition to being emphasised repeatedly in government documents, the development of the services sector is also written into the 13th Five-Year Plan (2016), which is the guideline for national development from 2016 to 2020.⁷²

As a subdivision of the service sector, the development of the domestic service industry matches the trend of service sector development and contributes to optimising the economic structure by increasing the share of the service sector. In 2016, the value added by the domestic service industry was 22.46 billion yuan, which is 15.4 per cent higher than the data of the

⁶⁸ Ibid.

⁶⁹ Yifu Lin “谈经济增长方式转型” 2014(2) Scientific development (Analysis about the Transformation of Economic Growth Pattern), at 11.

⁷⁰ Jianping Zha and Fangfang Tang “中国工业经济增长方式转变及其影响因素研究” 2014 36(5) Modern Economic Science (Research on the Change of Growth Pattern of Chinese Industrial Economy and Its Influencing Factors), at 61; Xiao Dong and Xingyi Dai “长三角区域环境污染根源剖析及协同治理对策” 2015 7(3) Chinese Journal of Environmental Management (The Root of Pollution in Yangtze River Delta and the Collaboration of Regional Environmental Governance); Fuhua Yuan “低碳经济约束下的中国潜在经济增长” 2010(8) Economic Research Journal (Potential Economic Growth of China under the Restraint of Low Carbon Economy) at 88-89; Baoping Ren and Xiao Shao “我国经济增长方式转变研究述评” 2007 9(4) Journal of Tianjin Administration Institute (Comments on the Transformation of the Economic Growth Model in China).

⁷¹ Government work report in the first meeting of the 13th National People’s Congress (政府工作报告——2018 年 3 月 5 日在第十三届全国人民代表大会第一次会议上), 5 March 2018, Premier of the State Council: Keqiang Li, available at http://www.gov.cn/guowuyuan/2018-03/22/content_5276608.htm.

⁷² Outline of the 13th Five-Year Plan for the National Economic and Social Development of the PRC (中华人民共和国国民经济和社会发展第十三个五年规划纲要), March 2016, available at: <http://www.ndrc.gov.cn/gzdt/201603/P020160318576353824805.pdf>.

previous year.⁷³ The growth rate of the domestic service industry is 7.6 per cent higher than the average growth rate of the whole service industry in China.⁷⁴ The total profit from the domestic service industry has increased by 27.8 per cent from 2016 to 2017, at 24.8 billion yuan.⁷⁵ Increase in the scale and profit of the domestic service industry also prompts the attraction of increased financial resources to this industry, which in turn contributes to the increase in the share of the service sector.

(c) Creating employment opportunities

The development of the domestic service industry can provide job opportunities to a large number of individuals, including unskilled workers but also college graduates.

The supply of job opportunities for migrant workers, especially workers in the construction and manufacturing industries, has been affected by the slowdown in GDP growth.⁷⁶ Moreover, industrial upgrading, which replaces labour intensive enterprises with high technology innovative enterprises, also results in a decrease in job opportunities for unskilled workers.⁷⁷ Although industrial upgrading will generate more job opportunities in the long term and more job opportunities for highly skilled workers, high technology innovative companies are usually not labour-intensive companies; these companies thus need fewer employees than labour-intensive enterprises. The fact that current workers' skill and knowledge do not satisfy the requirements of high technology companies also contributes to an increase in unemployment.⁷⁸ In addition, the increasing labour cost, which results from an

⁷³ Report on development of the domestic service industry in China in 2017, above n 36.

⁷⁴ Ibid, at 11.

⁷⁵ Ibid, at 8.

⁷⁶ Qing Zhang “经济增长减速下农民工就业困境及政策” 2016(1) Academic Exchange (Employment Difficulties Experienced by Migrant Workers in the Context of a Slowing Down Economic Growth) , at 48.

⁷⁷ Bin Hu and Jing Hu “上海产业结构调整与升级中的就业承载问题” 2016(5) Scientific development (The Research on Problems about Bearing Capacity of Employment in Shanghai in the Process of Industrial Structure Adjustment and Upgrading), at 29; Zhixin Zhu and others *中国经济中长期风险和对策* Review of Economic Research (Economic Science Press, Beijing, 2009) (Medium to Long-term Risk in the Economic Growth in China);

⁷⁸ Ling Yang “中国产业结构升级对就业的影响研究” (Master's dissertation, Southwestern University Of Finance And Economics, 2010) (Study of the Impact of Industrial Upgrading on Employment in China); Rong Mo and Yun

increase in wages and improvement of labour protection, negatively affects the supply of job opportunities for unskilled workers.⁷⁹ Factories have started to replace workers with robots or they relocate to other countries as a result of increased labour costs.⁸⁰ Consequently, there are fewer job opportunities for the unskilled in China.

The development of the domestic service industry can partly counteract this loss of job opportunities for two main reasons. First, unlike the slowdown of the economy, the domestic services industry is growing rapidly. The number of domestic workers in China increased from 18 million in 2013 to 25.42 million in 2016.⁸¹ Domestic workers made up 3 per cent of the total employment in China in 2017.⁸² Second, the domestic work industry can create job opportunities for unskilled workers due to its labour-intensive character and low entry threshold. Domestic service is labour intensive, and it is unlikely to be replaced by machines in the near future. Therefore, many job opportunities can be created as a result of its development. Moreover, domestic workers have a relatively low entry threshold, which enables many unskilled workers to find a job in this industry. The domestic service industry absorbs a large number of migrant workers from rural areas and unemployed workers in urban areas.⁸³

The development of the domestic service industry can provide job opportunities for college graduates. College graduates face increasing employment pressure due to the negative influence of the economic development slowdown on the supply of job opportunities and the

Chen “新常态下的就业形势” 2015(1) *China Labor* (Employment Situation in the New Normal) at 8; Dongmin Yao “产业结构升级背景下延迟退休与失业率的关系” 2016(1) *China Industrial Economics* (The Relationship between Delayed Retirement and Unemployment Rate under the Background of Industrial Structure Upgrading) at 78.

⁷⁹ Jinqiu Hua and Yuan Wang “深圳企业外迁现象透视” 2008 25(3) *Journal of Shenzhen University* (Humanities & Social Sciences) (An Analysis of Shenzhen Enterprises's Relocation), at 26.

⁸⁰ Tan Li “我国劳动力成本上涨对外资制造业的影响及政策建议” 2015(9) *China Economist* (Influence of Growing Labour Cost in China on Foreign-owned Manufacturing Companies and Corresponding Recommendations), at 44.

⁸¹ Report on Development of the Domestic Service Industry in China in 2017, above n 36.

⁸² Ibid.

⁸³ Ibid.

growing number of college graduates.⁸⁴ According to figures from the National Bureau of Statistics, there were 13.12 million newly-created job opportunities in 2015, which is 0.8 per cent lower than 2014;⁸⁵ however, there were 7.49 million college graduates in 2015, which is three per cent higher than 2014.⁸⁶ Moreover, there are more than seven million middle- and high-school students who do not continue their education after they complete their study.⁸⁷ That is, in addition to migrant workers there are around 15 million school leaver and college graduates in need of job opportunities.

The domestic service industry has the potential to accommodate college graduates. As discussed at the beginning of this section, domestic workers who have received systematic domestic work training or have a relevant educational background for domestic services are preferred by families/homeowners. They are willing to pay high wages to domestic workers who are reliable and provide high-quality services.⁸⁸

However, although there are job opportunities and high wages for highly skilled domestic workers, the wage is not the only determinant of college graduates' willingness to work as domestic workers. As will be discussed in the next section, the lack of regulation for domestic

⁸⁴ Yan Su “金融危机下地方院校理工科学生求职现状与路径分析” 2009 26(11) Journal of Liaoning Educational Administration Institute (Employment Prospect of Students from Science and Engineering Colleges under the Influence of the Financial Crisis); Chewei Zhang “新常态下就业面临的挑战” 2015(1) Social Sciences Digest (Pressure of Promoting Employment in the New Normal).

⁸⁵ Statistical Communiqué of the PRC on the 2014 National Economic and Social Development, National Bureau of Statistics of China, February 26, 2015, available at http://www.stats.gov.cn/english/PressRelease/201502/t20150228_687439.html; Statistical Communiqué of the PRC on the 2015 National Economic and Social Development, National Bureau of Statistics of China, February 29, 2016, available at http://www.stats.gov.cn/english/PressRelease/201602/t20160229_1324019.html.

⁸⁶ Report on Employment of College Graduates in China in 2016 (2016 年中国大学生就业报告), MyCOS, 12 June 2016, the statistic of the report is available at: <http://www.eol.cn/html/c/16dxsjybg/index.shtml>.

⁸⁷ Press Conference regarding the Human Resources and Social Security Development on the Second quarter of 2016 (人力资源社会保障部介绍第二季度人力资源和社会保障工作进展情况), Ministry of Human Resources and Social Security, 22 July 2016, available at http://www.gov.cn/xinwen/2016-07/22/content_5093759.htm.

⁸⁸ Jinyang Cai, Chao Zhang and Xinyi Guo “职业素养对家政服务人员收入的影响——基于“冰山模型”的验证与分析” 2017(7) Contemporary Economics (The Influence of Occupational skills on the Income of Domestic Workers: analysis and verification based on the "Iceberg Model").

service companies, inadequate legal protection for domestic workers and the bias against domestic workers also negatively affect their willingness to work as domestic workers. If the industry is well-regulated and domestic workers are adequately protected, the domestic service industry would be able to attract more college graduates.

(d) Optimising the allocation of resources

The development of the domestic service industry can contribute to optimising the allocation of resources through the social division of labour and distribution of wealth in at least two ways. First, the development of the industry promotes social division of labour which increases productivity. Strenuous housework occupies the time and energy of homeowners. Allocating housework to domestic workers not only enables households to spend more time in their paid jobs but also potentially increases the quality of the work conducted because of domestic workers' increased experience and vocational skills.⁸⁹

Second, the development of the domestic service industry can also contribute to reducing income disparity in Chinese society by improving domestic workers' wages. According to the China Family Panel Studies 2015, the richest one per cent of families in China own more than one-third of all wealth while the poorest 25 per cent of families own only one per cent of wealth.⁹⁰ The development of the domestic service industry can promote the professionalisation of the domestic industry and the standardisation of domestic services, which can in turn facilitate the formation of a market with healthy competition.⁹¹ Unlike the current situation in the domestic service industry, households are not willing to pay higher than average wages to domestic workers because they do not have a trustworthy standard to

⁸⁹ Chunying Hou “家务劳动社会化对女性家庭角色变化的影响” (Master's thesis, Shanxi Normal University, 2015) (The Effect of Housework Socialization on Change of the Role of Women in a Family); Zhao and others, above n 51, at 49.

⁹⁰ Jianxin Li and others *中国民生发展报告 2015* (China Family Panel Studies 2015, Beijing, 2015) (China Family Panel Studies 2015).

⁹¹ Li, above n 38, at 108; Liping Zhu and Shengwei Li “家政公司经营现状与规范化研究” 2012 3 Forum (Research on the Current Situation and the Standardization of Domestic Service Companies), at 251-252.

judge the service quality provided by these workers;⁹² however, households will be more likely to pay higher remuneration to domestic workers if the service comes with high quality of workers. Therefore, the development of the domestic service industry is beneficial to the improvement of domestic workers' income.

2 Insufficient legal protection for domestic workers in China contributes to the existing problems in the domestic work industry

Although the domestic service industry is important to the development of Chinese society, insufficient legal protection for domestic workers contributes to the emergence of significant problems, including the lack of public supervision of domestic service companies, bias against domestic workers, the inconsistent reliability of domestic workers, and the shortage of highly skilled human resources, in the domestic service industry. These problems hinder the development of the domestic service industry in China.

(a) Insufficient legal protection for domestic workers contributes to the public authorities' ineffective regulation for domestic service companies

Insufficient legal protection for domestic workers results in an economic incentive for owners of domestic service companies to run their business as intermediary domestic service companies, which are not properly regulated by public authorities. The lack of public authorities' effective regulation for domestic service companies has contributed to the current chaotic situation of the domestic service industry in China.⁹³ This chaotic situation not only

⁹² Xingda Gong “家政行业第三方电子商务平台的营销推广研究——以“找阿姨”网站(www.zhaoayi.com)为例” (Master's thesis, East China University of Science and Technology, 2012) (The Marketing of Domestic Services in E-commerce Platforms: Take the "Find Aunt" website (www.zhaoayi.com) as An Example).

⁹³ Sheng Dong and Changjiang Gao “高职院校与家政企业打造高质量家政人才的创新思路” 2012(3) Continuing Education (A Creative Approach to Improve the Occupational Skill of Domestic workers: Cooperation between Vocational Schools and Domestic Service Companies), at 29; Mao Cao and Ling Yang “昆明市月嫂从业状况分析与展望” 2010(3) The South of China Today (The Current Employment Situation of Confinement Nannies in Kunming City and Their Prospects); Li Dai and Lan Feng “浅析母婴护理师培训现存问题及应对策略” 2016(20) China Training (Problems in the Occupational Training for Maternity Nurse and Corresponding Solutions), at 255.

results in homeowners' distrust of domestic service companies and domestic workers but also discourages workers from entering the industry.⁹⁴ Consequently, the chaotic situation of the domestic service industry hinders the increase of the scale of the industry.

In the relationship between domestic service companies and domestic workers, there are primarily two modes of operation: the intermediary mode and the employment mode.⁹⁵ Intermediary companies do not establish labour relationships with domestic workers. They are brokers between domestic workers and homeowners. They generate earnings from introducing domestic workers to homeowners and charging brokerage fees from homeowners or domestic workers. The legal status of intermediary domestic service companies as being brokers means they are responsible neither for actions of domestic workers nor for the service quality provided by them. This mode thus requires low investment and has low legal responsibility. In contrast, domestic service companies which are operated in the employment mode establish labour relationships with domestic workers. They not only bear responsibility for the action of their domestic workers but also ensure that homeowners can receive the standard of service stipulated in the service contract. Operating domestic service companies in this mode thus requires higher investment and demands a higher legal responsibility in comparison to operating intermediary domestic service companies.⁹⁶ Consequently, the majority of domestic service companies are intermediary domestic service companies.⁹⁷

⁹⁴ Tieshan Fu and Fang Chen “我国家政服务市场价格乱象的解析与治理” 2018 Prices Monthly (The Chaotic Regulation on the Price of Domestic Services in the Domestic Service Industry in China)。

⁹⁵ In addition to these two modes, there is another mode of operation of domestic service companies called the membership mode. The membership mode is essentially an intermediary mode. In this mode, domestic workers are members of intermediary domestic service companies. Domestic service companies not only introduce homeowners to their member domestic workers but also provide some basic services, such as basic training and accommodation when they are not working, to domestic workers.

⁹⁶ Ruijie Wang “上海市家庭服务业现状分析与规范化建设” 2011(5) Scientific development (Analysis of the Current Situation of the Domestic Service Industry and Its Standardisation), at 96.

⁹⁷ Lin Zhang and Yi Yang “人口新常态背景下农村家政女工生存与发展现状调研——基于北京、广州、武汉、西安的样本分析” 2016(5) Hubei Social Sciences (An Survey of the Living Condition of Migrant Domestic Workers from Rural Areas in the Context of the Population New Normal), at 55; Zhao and others, above n 51, at 44.

There is not a clear division of the legal power of public authorities regarding responsibility for regulating intermediary domestic service companies and there is very little regulation about these companies from the public authorities.⁹⁸ The regulation for domestic service companies usually involves different offices of the public authorities, such as the bureau of industry and commerce, bureau of human resources and social security and bureau of civil affairs.⁹⁹ The involvement of different public authorities results in the overlap of administrative power.¹⁰⁰ Such overlap not only leads to a waste of administrative resources but also contributes to the avoidance of responsibilities among public authorities when there are problems needing to be addressed, effectively creating a regulatory void.¹⁰¹

Moreover, the lack of adequate legal grounds for public authorities to regulate the activities of intermediary domestic service companies results in a chaotic situation of the domestic service industry. When public authorities find that domestic service companies have done things which are harmful to the interests of homeowners and the domestic workers, they may be unable to correct and sanction these domestic service companies. For example, there is no mandatory national standard on the evaluation of the occupational level of domestic workers.¹⁰² Therefore, domestic service companies can use their own standard to evaluate and rank domestic workers as they want. In order to attract homeowners, domestic service companies may claim that their domestic workers are “golden level” or “five-star” workers when, in fact, these workers are poorly skilled.¹⁰³ While these descriptors can mislead

⁹⁸ Fang Yang and others “政府规制与行业自律并行的家政行业监管体系研究” 2018(2018 年 03) Reform & Opening (Research on Government Regulation and Self Regulation of the Domestic Service Industry), at 115.

⁹⁹ Xiai Li and Xiaozhuo Zhu “困境与出路: 家政服务业之法治化路径研究” 2016 8 Legal System and Society (Predicament and Solutions: Legislation on Regulation of the Domestic Service Industry) at 275; Wang, above n 96; Jianping Guo, Bingtai Cao and Shengshuai Luo “改善江苏省家政服务业发展状况的对策探究” 2011(1) Jiangsu Commercial Forum (Research on the Improvement of the Domestic Service industry in Jiangsu Province) at 37.

¹⁰⁰ Li and Zhu, above n 99, at 275; Xijing Li “浅析我国家政服务业的标准化建设” 2017(4) Quality and Technical Supervision Research (Standardisation of the Domestic Service Industry in China), at 15.

¹⁰¹ Li and Zhu, above n 99, at 275; Li, above n 100, at 15; Guo, Cao and Luo, above n 99, at 37.

¹⁰² Mei Ding “我国职业 “月嫂” 培训管理研究现状” 2016 36(5) Journal of Gannan Medical University (Current Situation of the Occupational Training of Confinement Nannies in China), at 685.

¹⁰³ Jiadong Fu and Tao Xu “当前家政服务行业治理对策的分析” 2014 1 Administration for Industry and Commerce (Solutions for Existing Problems in the Domestic Service Industry), at 55.

homeowners into believing that these domestic workers are highly skilled, public authorities cannot ban and punish this type of advertisement because there is no mandatory national standard classifying the occupational skill level of domestic workers.

This chaotic situation in the domestic service industry has resulted in difficulties for homeowners to recruit reliable and skilled domestic workers.¹⁰⁴ They may end up paying unskilled domestic workers a high wage or even hiring dangerous domestic workers who may endanger their property or personal safety.¹⁰⁵ It is common for domestic service companies to use misleading and false occupational certificates or to fabricate a long work history for their domestic workers to attract homeowners.¹⁰⁶ Ordinary homeowners, who do not have a deep understanding of the actual operation of domestic service companies, can be easily misled by domestic service companies' s false information.¹⁰⁷

Moreover, the existence of unregistered domestic service companies increases the safety risk of homeowners. Starting an intermediary domestic service company has low overheads.¹⁰⁸ People can start their intermediary services with only a mobile phone.¹⁰⁹ Therefore, the majority of domestic service companies are operated in small rented shopfront close to residential areas with one or few receptionists. The inadequate or nonexistent regulation of domestic service companies means that there are many unlicensed companies.¹¹⁰ The

¹⁰⁴ Fengmei Yuan, Ayiguli and Yali Dai “乌鲁木齐市月嫂管理现况对产妇健康影响研究” 2012 42(4) Xinjiang Medical Journal (Management of Confinement Nanny and the Health Condition of New Mothers in Urumchi).

¹⁰⁵ Yang, above n 29, at 89.

¹⁰⁶ Fu and Xu, above n 103

¹⁰⁷ Jingdong Lin “揭秘月嫂速成:高级母婴护理师培训五天就上岗” *Beijing Times* (Beijing, 2013).

¹⁰⁸ Xianzhi Wang “上海市家政服务人员调查研究” (Master's thesis, Lanzhou University, 2010) (An Survey of Domestic Workers in Shanghai), at 34; Sujuan Guo “政府在家政市场中的干预行为及其影响研究” (Master's thesis, Tsinghua University, 2014) (Research on Government Intervention on the Domestic Service Industry and the Result of the Intervention), at 14-15.

¹⁰⁹ Guo, above n 108, at 14; Zhao and others, above n 51, at 43; Jin Huang “家政服务业的“非正规性”与发展策略” 2004(5) Social Science Research (Informality of the Domestic Service Industry and Its Development Strategy), at 12.

¹¹⁰ Xingdong Shao and Xianzhong Meng “转型期家政行业“准员工制”管理研究——以上海为例” 2014(21) Human Resources Development of China (Research on the Management of "Quasi-employment Mode" Domestic Service Companies in the Transitional Period: Take Shanghai as an Example), at 97-98; Chenxin Hao, Lihong Yang

unlicensed status of these companies means that, even when their illegal behaviours are caught and punished by public authorities, they often just shut down their current shop and/or relocate to another place to avoid legal responsibilities. Consequently, these companies tend to seek short-term interests.¹¹¹ They thus do not value the quality of their services, and they even do not hesitate to undertake illegal activities to obtain a profit.¹¹²

(b) Insufficient legal protection for domestic workers contributes to a lack of trust in the domestic service industry

Guaranteeing the safety and reliability of domestic work is of the highest importance because the work relates to the safety and privacy of households and often involves caring for those who are vulnerable and dependent. However, homeowners usually doubt the reliability of domestic workers and the service quality provided by them.¹¹³

The reliability of domestic workers is often challenged on the basis of immoral or illegal behaviour towards family members in the household, especially vulnerable ones who are unable to protect themselves, such as children or the elderly.¹¹⁴ There are frequent media reports in China about the criminal activities of domestic workers, such as theft or even killing

and Guanyi Xia “家政服务空间广阔规范运作势在必行--沧州市家政服务业抽样调查专题报告” 2012(2) Statistics and Management (Regulation for the Domestic Service Industry Needs to be Developed: a Survey of the Domestic Service Industry in Cangzhou City), at 38; Qin Chen, Yunjian Xia and Zefeng Huang “基于 SWOT 分析我国家政服务发展问题研究--以长乐市家政服务为例” 2014 27(3) Journal of Changchun University of Science and Technology (Social Sciences Edition) (The Analysis of the Development of the Domestic Service Industry in Changle City: from the perspective of the SWOT), at 83; Zhao and others, above n 51, at 43.

¹¹¹ Li, above n 38, at 108; Guo, Cao and Luo, above n 99, at 37; He, above n 40, at 88.

¹¹² Xiaolong Shen “我国家政服务人员犯罪问题及其应对研究” 2016(13) Reform & Opening (Research on Crimes Committed by Domestic workers in China and Measures to Prevent the Crimes), at 49; Yang and others, above n 40.

¹¹³ Ma. Haiwei and others “家庭服务行业法律纠纷问题及其对策研究” 2012 3 Social Sciences Review (Research on Legal Disputes in the Domestic Service Industry and Solutions), at 59-61; Le Yang “北京市“保姆荒”现状调研” 2009(12) Consumption Guide (A Survey of the Shortage of Domestic Workers in Beijing), at 11-12.

¹¹⁴ Yihui Su “控制与抵抗:雇主与家政工在家务劳动过程中的博弈” 2011 31(6) Chinese Journal of Sociology (Control and Resistance: The Dynamics between Employers and Domestic Workers in the Labour Process of Domestic Work), at 91.

the people who are in their care.¹¹⁵ These reports are severely detrimental to the reputation of domestic workers as a whole.

The poor service quality provided by domestic workers can result in an unsatisfactory experience of homeowners. Property loss, personal injuries or health problems are further worries for many households because many domestic workers lack the necessary knowledge to use modern home appliances.¹¹⁶ There also are concerns about poor hygiene habits.¹¹⁷ Consequently, the quality of domestic service is not trusted by households.¹¹⁸

A key factor that contributes to the lack of trust in domestic services is the insufficient legal protection for domestic workers. Insufficient legal protection for domestic workers means such workers can hardly obtain necessary occupational training, such as safety training courses. Intermediary domestic service companies do not have the legal obligation to provide pre-employment training to domestic workers. Domestic workers thus usually cannot obtain necessary occupational training from domestic service companies. Moreover, even local governments provide subsidised or free occupational training regarding domestic services, domestic workers may be unable to attend this training due to their unpredictable working hours and lack of regular daily rest breaks. Domestic workers may even do not have time to improve their skills and knowledge through self-learning because of their lack of regular breaks. Consequently, more than half of domestic workers in China have not received any

¹¹⁵ A recent and widely known case of domestic workers' criminal behaviours was a domestic worker charged with arson in Hangzhou city. The arson of the domestic worker resulted in the death of a young mother and three children. The domestic worker was condemned with a death penalty in the Hangzhou Intermediate People's Court on 9 February 2018.

¹¹⁶ Shao and Meng, above n 58, at 99-100.

¹¹⁷ Li, above n 38, at 109; Hao, Yang and Xia, above n 110, at 38.

¹¹⁸ Yuan, Ayiguli and Dai, above n 104, at 119.

occupational training before.¹¹⁹ It is difficult to guarantee the service quality of domestic service because of their inadequate occupational training.¹²⁰

Moreover, the insufficient legal protection for domestic workers contributes to a lack of background checks of domestic workers, which gives domestic workers opportunities to undertake immoral or even illegal acts without being caught easily.¹²¹ While personal information of employees needs to be submitted to and verified by the labour authorities, the lack of labour protections for domestic workers means their personal information does not need to be verified by any public authorities. However, there is no vetting of the personal information of domestic workers because neither householders nor intermediary domestic work companies are able to recognise fake identity documents, as they do not have access to public security systems.¹²² Consequently, some domestic workers take advantage of the complicated process involved in validating identities and they use false identities to enable them to escape responsibilities or even to commit illegal acts in households.¹²³ The use of fake identifies moreover makes it difficult for the police and judicial authorities to find the worker and restore household losses.¹²⁴ The use of false identity among domestic workers thus contributes to homeowners' low trust in domestic workers. This distrust is detrimental to homeowners' willingness to hire domestic workers or their willingness to pay a high wage for domestic services. This thus hinders the improvement of the economic scale of the domestic service industry and the development of high-end domestic services.

¹¹⁹ Wang, above n 87, at 96-97; Yani Wu “家政行业国内市场潜力的调查与分析” 2008(12) *Modern Property Management* (Survey of the Domestic Service Industry and Analysis of its Potential in China), at 109.

¹²⁰ Li and Bao, above n 60, at 186; Li, above n 91, at 14; Yinzen Yi ““产学研”一体化:我国高校家政教育发展的必由之路” 2013(1) *China Higher Education Research* (Combining the Education with the Production: a Necessary Way to Develop the High Level Domestic Service Education in China), at 74; Junfeng Li “我国家政服务业的正规化策略” 2007(3) *Human Resources Development of China* (Strategies on the Standardisation of the Domestic Service Industry in China), at 23.

¹²¹ Yang and others, above n 98, at 115; Shen, above n 112, at 48-49.

¹²² Yang and others, above n 89, at 114.

¹²³ At 114; Shen, above n 103, at 49.

¹²⁴ Huiqi Ye “关于社会“隐形人”管控的探讨” 2007(4) *Journal of Zhejiang Police College* (Regulation of "Invisible People" in the Chinese Society).

(c) Inadequate legal protection for domestic workers contributes to people's bias against domestic workers

The prevalence of bias against domestic workers is detrimental to the development of the domestic service industry. It not only stops workers from entering the industry but also contributes to the loss of skilled workers.¹²⁵ In turn, the lack of experienced and highly skilled domestic workers in the domestic service industry constrains the development of high-end domestic services.¹²⁶

Domestic work is still deemed as menial work, associated with the traditional household servants of the past, when they were forced to work for other households because of poverty or humble social status.¹²⁷ They were not respected by society, and their work was not considered to be a formal job.¹²⁸ Such a concept still affects domestic workers of the present, whose work is similar to that of servants in the past.¹²⁹ Moreover, domestic work is usually considered a low-end job that requires no occupational skill.¹³⁰ It is regarded as a job for those who cannot find other jobs.¹³¹ This bias against domestic work creates a public perception that domestic work is shameful and not a real job.¹³²

¹²⁵ Li and Zhu, above n 99, at 275; Dong and Gao, above n 93, at 29; Wang, above n 26, at 73-74.

¹²⁶ Dong and Gao, above n 93, at 29.

¹²⁷ Kun Xia “晚清广州女佣研究” (Master's thesis, Jinan University, 2006) (A Study of Maid in Guangzhou in the Late Qing Dynasty) [D] ; Jingjing Huang “浅谈近代女佣与中国社会” 2013(2) Lantai World (Domestic Workers in Modern Chinese Society).

¹²⁸ Yinghui Song and Jikai Li “中国 20 世纪 30 年代小说中的女佣形象初探” 2009(3) Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition) (An Initial Exploration of the Image of Female Servant in Chinese Novels in the 1930s); Dan Ma “北京市住家家政工的劳动过程分析 ” 2015(2) Chinese Workers (Analysis of the Work Procedure of Live-in Domestic Workers in Beijing), at 18.

¹²⁹ Dong and Gao, above n 93, at 29; Wanli He “青年保姆务工动因的社会学分析—以福州市个案为例” 2009 2009(3) Youth Studies (Sociological Analysis of the Motivation of Young Domestic Workers in Fuzhou City), at 61; Li and Zhu, above n 99, at 275; Hu, above n 26, at 140; Li and Zhu, above n 99, at 275; Yanling Lin and Yi Ren “家政工人与体面劳动” 2010(9) Chinese Workers (Domestic Workers and Decent Work), at 12.

¹³⁰ Zhang and Yang, above n 97, at 53.

¹³¹ Ibid.

¹³² Yuxia Hu “家政服务员的社會支持” (Master's thesis, Shanghai Academy of Social Sciences, 2006) (Social Support for Domestic Workers).

The lack of access to legal protection consolidates people's idea that domestic work is not a formal job.¹³³ Although domestic work is recognised as a formal occupation in the Classifications of Jobs of the People's Republic of China,¹³⁴ the perception that domestic work is an informal job is hard to change if domestic workers do not have access to adequate legal protection. In addition, the inadequate legal protection of domestic workers is a critical factor that results in their poor standard of living.¹³⁵ People may undervalue domestic work and despise domestic workers due to their low standard of living.¹³⁶

(d) Inadequate legal protection for domestic workers contributes to the inadequate numbers of highly skilled domestic workers in the domestic service industry

Although the wages of domestic workers, especially for highly skilled domestic workers, have increased steadily in recent years, domestic work is still not considered to be a desirable job due to its lack of labour protection and job security.¹³⁷ Even if highly skilled domestic workers usually have a higher income, this cannot compensate for their loss of legal rights, which are connected to their employment status. Consequently, the domestic service industry is unable to attract and keep highly-skilled domestic workers. This situation constrains the development of high-quality domestic services, which in turn intensifies the public perception that domestic service is a shameful job.¹³⁸

¹³³ Wang, above n 96, at 92.

¹³⁴ The Classifications of Jobs of the PRC(中华人民共和国职业分类大典), 2015 edition, compiled by the Ministry of Labour and Social Security, the General Administration of Quality Supervision, Inspection and Quarantine, and the National Bureau of Statistics of the PRC, published by the China Labour and Social Security Publishing House.

¹³⁵ Lin Zhang and Yi Yang “家政女工体面劳动赤字的社会排斥分析--基于武汉市的调查” 2014(12) Hubei Social Sciences (An Analysis of Domestic Workers' Social Exclusion: Based on a Survey in Wuhan city), at 55.

¹³⁶ Hu, above n 132, at 15.

¹³⁷ Xia Cai “高端家政服务公司创立与发展战略探究——女大学生基于就业难背景下的创业新尝试” 2012(20) Modern Business Trade Industry (The Establishment and Development of High-end Domestic Service Companies), at 15-16.

¹³⁸ Yi, above n 120; Haiwei and others, above n 113.

The lack of labour protections for domestic workers means that migrant domestic workers are unable to obtain certain rights, such as changing the location of their household registration,¹³⁹ which is connected to a worker's employment status. In China, employment status is not only connected with access to labour protections, but also the enjoyment of public services, such as buying social insurance and eligibility to change the place of household registration. Without full access to these social services, migrant domestic workers and their family members are unable to receive social services, such as public education and public housing.¹⁴⁰ Consequently, it is difficult for migrant domestic workers to bring their family members, especially their children, to live with them in the place where they work, if they do not have employment status.¹⁴¹ Even for highly skilled migrant domestic workers who have enough financial ability to afford a reasonable standard of living for their family members, the fact that they cannot access public services is likely to limit their ability to bring their family to the place where they work.¹⁴² If migrant domestic workers want to have full access to public services, they need to find a job that gives them employee identity. Consequently, highly skilled workers usually do not even consider working as domestic workers.¹⁴³

Even though the wages of highly skilled domestic workers have increased substantially in recent years, the lack of employment-based legal rights and low job security mean that

¹³⁹ Chapter 3 will explain the household registration system in China.

¹⁴⁰ Yemiao Wu “农业人口转移的新常态与市民化进路” 2016(3) *Issues in Agricultural Economy* (The New Normal of the Relocating Agricultural Population and the Urbanisation of Migrant Workers), at 45-48; Haiying Gu and others “现阶段“新二元结构”问题缓解的制度与政策” 2011 11 *Management World* (Mechanism and Policy on Improving the Disparity between Rural and Urban Regions in China), at 55-59.

¹⁴¹ Zhihui Wu and Jingmei Li “农村留守儿童生存现状调查报告” 2015 32(1) *China Agricultural University Journal of Social Sciences Edition* (The Investigation Report of the Living Condition of Left-behind Children in Rural Areas in China), at 65.

¹⁴² Huisheng Tian and others “进城务工农民随迁子女教育状况调研报告” 2008 *Educational Research* (Investigation Report on the Educational Status of the Children Living with the Rural Migrant Workers in Cities), at 18; Wanpeng Lei “新生代农民工子女教育调查与思考” 2013(5) *Journal of Huazhong Normal University* (Humanities and Social Sciences) (Survey on the Education for Children of the New-generation Migrant Workers), at 141.

¹⁴³ Zhonghai Zhang “家政职业化进程中的困境与对策” 2010 9(3) *Journal of Yangling Vocational & Technical College* (Obstacles that Hinders the Professionalisation of Domestic Services and Solutions), at 39-40.

working in the domestic services continues to remain a poorly remunerated job compared to people who have employment status. For example, confinement nannies¹⁴⁴ are commonly considered to have high incomes in China. The wage of a skilled confinement carer could be more than 10,000 yuan per month in Shanghai in 2018,¹⁴⁵ which is significantly higher than Shanghai's average wage, which was 7,132 yuan, in 2017.¹⁴⁶ However, domestic confinement carers are responsible for their own social insurance and do not have other employment benefits such as holiday pay. Therefore, the actual wage for such skilled workers is not high because they must cover the cost of their retirement pension insurance and medical expenses as well as save money for periods in between jobs. Moreover, the temporary nature and absence of job security affect their incomes negatively. One working term for short-term domestic workers, such as confinement nannies, usually lasts for less than one month. It means that, while these domestic workers could have a high monthly wage, their loss of income during the intervals between positions could contribute to a low gross income.

The shortage of highly skilled domestic workers is detrimental to the development of high-end domestic services in China. There are two classes of domestic services according to their quality and type, namely, basic and high-end domestic services. Basic domestic services include regular or conventional cleaning, cooking and child minding, which usually do not require additional occupational training.¹⁴⁷ High-end domestic services, such as cooking a nutritious meal and providing infant and maternal care, involve more occupational skills than conventional domestic services do.¹⁴⁸ While high-end domestic services require

¹⁴⁴ A confinement nanny is a domestic worker who provides care to a new mother and her baby in order to ease her transition process from a pregnant woman to a new mother.

¹⁴⁵ The Guide Price for Domestic Services in the First Quarter for 2018 in Shanghai (2018 年第一季度上海家政服务指导价), Shanghai Women's Federation, 16 April 2018.

¹⁴⁶ The Average Wage of Employees in China in 2017, Shanghai Human Resources and Social Security Bureau, 23 March 2018, available at: http://www.12333sh.gov.cn/201712333/xxgk/flfg/qtxfw/201805/t20180518_1282332.shtml.

¹⁴⁷ Zhao and others, above n 51, at 41.

¹⁴⁸ Yang, above n 29, at 85.

comprehensive training in management, scientific theories or even knowledge of foreign languages, basic domestic services require comparatively little training.¹⁴⁹

Despite the increasing demands for high-quality domestic services and a wide variety of domestic services from Chinese homeowners, domestic workers in China has not met such demand due to poor occupational skill of domestic workers. To meet the increasing demand for high-quality domestic services, some Chinese domestic service companies have started recruiting highly skilled domestic workers from other countries, usually from the Philippines, since the 2000s.¹⁵⁰ However, overseas domestic workers are not likely to fill sufficiently the demand for highly skilled domestic workers in China because China does not allow its residents to hire foreign domestic workers.¹⁵¹ Domestic service companies usually use alternative ways for foreign domestic workers to enter China. In particular, they use short-term visas such as business, tourist or visitor visa. Such methods involve high risks for foreign domestic workers, domestic service companies and homeowners because they represent a breach of immigration law.¹⁵² Moreover, the cultural differences, such as lifestyle, food

¹⁴⁹ Ibid, at 84-86.

¹⁵⁰ Jie Zhang “从“菲佣”现象透视市场经济条件下的外国人就业管理” 2007 19(5) Journal of Shandong Police College (Regulation on Employment of Foreign Workers in China: Take the Domestic Worker from the Philippines as an Example), at 111; Ming Yan and Feng Chen “在杭“菲佣”调查及管理之思考” 2009(6) Journal of Zhejiang Police College (Survey of Filipino Domestic Workers in Hangzhou City), at 72.

¹⁵¹ Regulations on the Management of Employment of Foreigners In China(外国人在中国就业管理规定), the Ministry of Labour of PRC, 01 May 1996. According to this regulation, units that employ foreigners shall apply for employment permission for these foreigners and shall employ foreigners only establish a labour relationship with the foreign workers after obtaining a Certificate of Permitting the Employment of Foreign Workers. Foreign workers can only work in positions which are in special need and which can not be taken up by domestic candidates.

¹⁵² Article 80 of the Exit and Entry Administration Law of the PRC (中华人民共和国出境入境管理法), 1 July 2013, foreigners who work in China illegally shall be fined not less than RMB 5,000 but not more than RMB 20,000 yuan; where circumstances are serious, they shall be detained for not less than five days but not more than fifteen days and shall also be fined not less than RMB 5,000 yuan but not more than RMB 20,000 yuan.

Persons who introduce jobs to ineligible foreigners shall be fined RMB 5,000 yuan for each job illegally introduced to one foreigner, with a cap of not more than RMB 50,000 yuan in total; and entities that introduce jobs to ineligible foreigners shall be fined RMB 5,000 yuan for each job illegally introduced to one foreigner, with a cap of RMB 100,000 yuan in total; and the illegal gains, if any, shall be confiscated.

Individuals or entities that illegally employ foreigners shall be fined RMB 10,000 yuan for each illegally employed foreigner, with a cap of RMB 100,000 yuan in total; and the illegal gains, if any, shall be confiscated.

preference, and language, determine that foreign domestic workers could not replace local domestic workers if even China allowed its citizens to hire foreign domestic workers.

Conclusion

The domestic service industry in China is important to the development of Chinese society. It has the potential to promote the development of the economy, optimise the country's industrial structure, relieve unemployment pressure, and optimise the allocation of resources in China. However, significant problems, including the lack of effective regulation of domestic service companies by public authorities, the prevalence of bias against domestic workers, the lack of trust between domestic workers and homeowners, and the shortage of highly skilled workers, have hindered the development of the domestic service industry. This chapter argues that a critical reason for the prevalence of these problems is the non-existent or insufficient legal protection for domestic workers in the labour market. Therefore, empowering these workers with legal protection is likely not only to contribute to the improvement of their standard of living but also to facilitate the function of the domestic service industry in the development of Chinese society generally.

D Theoretical framework

This research is underpinned by the capability theory. The capability approach was first proposed by Sen in a 1979 lecture presented at Stanford University entitled “Equality of What?”¹⁵³ The core focus of the capability approach is on what individuals are able to do. According to Sen, the capability approach to human well-being is a “concentration on the freedom to achieve in general and the capabilities to function in particular”, and the core concepts of this approach are “functionings and capabilities”.¹⁵⁴ It is about freedom and the

¹⁵³ Sen, above n 5,

¹⁵⁴ Sen, above n 6, at 266.

development of an environment suitable for human flourishing.¹⁵⁵ A functioning is an achievement, whereas a capability is the ability to achieve.¹⁵⁶ Sen claims that a person's well-being must be evaluated in the light of a form of assessment of the functionings achieved by that person.¹⁵⁷ This capability to achieve functionings reflects the person's real opportunities or freedom of choice between possible lifestyles¹⁵⁸ – that is, functionings are what people want to be capable of, or should be capable to be and/or do; capabilities represent the alternative combinations of functionings that are feasible for a person to achieve.

The capability approach is a suitable theoretical framework to analyse the issues faced by domestic workers in China for two reasons:

Firstly, the capability approach takes into consideration not only the economic development or income of domestic workers but other factors that can improve people's well-being. A key obstacle to the improvement of the well-being of marginalised workers, such as domestic workers, in China, is the government's perspective on social development. Local economic growth mainly decides the political career of a local official in China.¹⁵⁹ Therefore, the primary focus of officials is the annual GDP; other factors such as the protection of marginalised groups in their administrative region are largely ignored.¹⁶⁰ Because the situation of marginalised workers has limited influence on the GDP, most of their problems are usually ignored by officials.

¹⁵⁵ Melanie Walker "Amartya Sen's Capability Approach and Education" 2005 13(1) Educational Action Research 103, at 103.

¹⁵⁶ Amartya Sen *The Standard of Living* (Cambridge University Press, Cambridge, 1988), at 36.

¹⁵⁷ Amartya Sen *Inequality Reexamined* (Oxford University Press, United States, 1992), at 31.

¹⁵⁸ Sen Amartya "Capability and Well-being" in Daniel M. Hausman (ed) *The Philosophy of Economics* (3rd ed, Cambridge University Press, New York, 2007) 270-294, at 46.

¹⁵⁹ Ye Chen, Hongbin Li and Li-An Zhou "Relative Performance Evaluation and the Turnover of Provincial Leaders in China" 2005 88(3) Economics Letters 421, at 422.

¹⁶⁰ Yun Feng "Is Economic Performance Important for Chinese Official Promotion " 2013 16(11) Journal of Management Sciences in China 55, at 58.

The emphasis on economic development also reflects on the legislation applicable to domestic workers. As will be revealed in Chapter Four of this thesis, legislation applicable to domestic workers emphasises the protection of homeowners and the regulation of domestic service companies.¹⁶¹ A key objective of protecting homeowners and regulating domestic service companies is promoting the consumption of domestic services. In particular, China gives homeowners legal protection to dispel their worry about the risks of hiring unqualified domestic workers. Similarly, the regulation on domestic service companies is enforced to address their illegal activities, such as using false information to mislead homeowners. The regulation on domestic service companies thus contributes to the increase of homeowners' trust in domestic services. While the promotion of consumption of domestic services contributes to the income increase of domestic workers, their legal protection, which also connects to their wellbeing, is mostly ignored.

In contrast to this current focus on measuring development solely in terms of economic growth or the income of domestic workers, the capability approach considers not only economic development as a measure of wellbeing, but also other metrics such as human development, which provides a framework for comprehensive research on domestic workers. Sen believes that the focus should be on what people are able to do, rather than on what people could buy with their income. Therefore, Sen came to focus on what is of intrinsic value in life, rather than on the goods that provide instrumental value or utility.¹⁶² The capability approach argues for well-being and quality of life, not only income generation – a person's well-being is not merely a matter of how rich he or she is. While developing capabilities is undoubtedly correlated with the growth of national GDP and individual income generation, this is seen as a means to expanding human capability “to lead more worthwhile and freer lives”; raising incomes alone will not always increase well-being.¹⁶³ Therefore, analysing the legislation applicable to domestic workers from the perspective of their capabilities can avoid the

¹⁶¹ See Chapter 4

¹⁶² Steven Pressman and Gale Summerfield “The Economic Contributions of Amartya Sen” 2000 12(1) Review of Political Economy 89, at 97.

¹⁶³ Amartya Sen *Development as Freedom* (Oxford University Press, United States, 1999), at 74.

ignorance of legal protection which could result from measuring their current situation in the Chinese society solely in terms of their income.

Secondly, the capability approach supports both the goal of providing domestic workers with adequate legal rights and the goal of ensuring their enjoyment of legal rights in practice.¹⁶⁴ The capability approach stresses the importance of both social factors and individual agency.¹⁶⁵ The emphasis on social factors means society has the responsibility to ensure its people's minimum well-being such as poverty alleviation, elimination of gross economic inequality, pursuit of social justice, social security through the provision of public goods.¹⁶⁶ In terms of legal protection for domestic workers, the emphasis on social factors means society has the responsibility to develop legislation to ensure the enjoyment of minimum well-being of domestic workers. Therefore, developing legislation from the perspective of improving the capability of domestic workers requires the Chinese government to emphasise the protection of domestic workers.

Moreover, the capability approach meets the requirement of guaranteeing domestic workers' enjoyment of their legal entitlement in practice. The capability approach values the well-being freedom and freedom of individual agency.¹⁶⁷ Well-being is the measurement or extent of how well or comfortable an individual is in his or her life.¹⁶⁸ Sen describes well-being freedom as freedom which results from the well-being of an individual.¹⁶⁹ Therefore, a person's capability set represents his or her well-being freedom.¹⁷⁰ In terms of legal protection for domestic workers, well-being freedom captures the requirement of guaranteeing the enjoyment of their

¹⁶⁴ As will be discussed in Chapter Three, in order to improve the precarious status of domestic workers, China should not only provide them adequate legal rights, but also ensure their enjoyment of legal rights.

¹⁶⁵ A Sen Commodities and capabilities (Prof. Dr. P. Hennisman Lectures in Economics Vol. 7) , at 25-26.

¹⁶⁶ Sen, above n 157, at 71.

¹⁶⁷ Amartya Sen "Well-Being, Agency and Freedom: The Dewey Lectures 1984" 1985 82(4) The Journal of Philosophy , at 203-204.

¹⁶⁸ Ibid, at 202.

¹⁶⁹ Ibid, at 202-203.

¹⁷⁰ Ingrid Robeyns "The Capability Approach: a theoretical survey" 2005 6(1) Journal of Human Development , at 103.

legal rights.

Different from well-being freedom, agency freedom relates to a person's conception of the good life.¹⁷¹ The agency freedom thus means people's freedom to achieve whatever they want to achieve regardless of the achievement is beneficial or detrimental to their well-being.¹⁷² As will be discussed in Chapter Five of this thesis, in order to guarantee the enforcement of legal rights for domestic workers in practice, legal protection for domestic workers has to meet the variety of pursuits among domestic workers. The analysis of legislation from the perspective of the capability approach thus can capture the variety of pursuits among domestic workers.

The capability approach is an appropriate theoretical framework for addressing the precariousness of domestic workers. It emphasises the provision of legal rights to domestic workers and, more importantly, domestic workers' enjoyment of legal rights. The capability approach also captures the requirement of considering plurality among domestic workers. Therefore, the perspective of developing domestic workers' capabilities is a suitable way to evaluate legislation on protecting domestic workers in China.

E Methodology

To analyse the precarious status of domestic workers in China and provide legal reform recommendations to address their precarious status, this thesis relies on a combination of the doctrinal legal approach and the social legal approach. It also compares Chinese domestic law, which applies to domestic workers, with the ILO Domestic Workers Convention to identify insufficiencies in the Chinese legislation and to find an alternative direction for the development of legislation for domestic workers in China.

¹⁷¹ Sen, above n 158, at 204.

¹⁷² Ibid.

1 Doctrinal approach

The thesis first adopts a doctrinal legal approach to identify the existing legal rights of domestic workers in China, and to analyse workers' legal status. The doctrinal legal approach involves identifying relevant the law, analysing it and discovering the logical reasoning behind it.¹⁷³ This approach thus can be used to analyse and evaluate the functions and limitations of primary sources such as legislation, government policy and case law.¹⁷⁴

Finding and assessing the legislation lays the foundation for analysing the implementation of legislation in practice. The thesis uses the doctrinal legal approach to find the applicable legislation and the legal rights of domestic workers in China and then to analyse the logical reasoning underlying the legislation and the workers' legal rights. For example, a doctrinal question of the legal rights of domestic workers in their relationship with homeowners will ask: what is the applicable law regulating the relationship? The doctrinal analysis will further reveal that the applicable legislation for regulating the relationship is the General Principles of the Civil Law of China,¹⁷⁵ and the Contract Law of China.¹⁷⁶ The question will further include an assessment of the legal rights that domestic workers can obtain from these two laws.

The doctrinal legal approach has limitations. The analysis resulting from applying this approach is limited to the researchers' subjective comprehension.¹⁷⁷ The analysis may also fail to capture the actual working of the law and ignores non-legal factors.¹⁷⁸ The objective of the thesis is to propose practical legal reform recommendations that can address the precarious

¹⁷³ Dawn Watkins and Mandy Burton *Research methods in law* (Routledge, Milton Park, Abingdon, Oxon; New York, 2013), at 9.

¹⁷⁴ Annick Masselot "The emerging childcare strategy in European Union law: the struggle between care, gender equality and the market" 2016, at 39.

¹⁷⁵ General Principles of the Civil Law of the PRC (《中华人民共和国民法通则》), April 12, 1986, entered into force 1 January 1987, available at: http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4470.htm

¹⁷⁶ Contract Law of the PRC (《中华人民共和国合同法》), 15 March 1999, entered into force 01 October 1999.

¹⁷⁷ Watkins and Burton, above n 173.

¹⁷⁸ Xiang, above n 27.

status of domestic workers in China. The limitation of the approach means that using this approach solely cannot reveal the way the legislation actually works and ensure the practicality of the recommendation. Therefore, the thesis uses a socio-legal approach to complement the limitations of the doctrinal legal approach. The socio-legal approach involves not only the legal entitlement of domestic workers but also on the actual working of the legal rights of domestic workers.

In addition, the process of translating Chinese legislation into English can aggravate the limitation of subjectivity in the doctrinal approach. China has not issued an official English version of its laws. Therefore, the thesis involves the translation of relevant Chinese legislation into English. Differences between the original legislation and the translated language can affect the objectivity of the analysis. An inaccurate translation can result in an incorrect assessment of the legislation. Although the Chinese legal system shares some similarities with the rest of the world, especially with civil law countries such as French and Germany, its labour law system contains characteristics of its socialist political system. This means that some terms in the Chinese legal system do not have corresponding terms in English.

To ensure an accurate analysis of Chinese legislation in English, and to ensure that the thesis is comprehensible, the thesis will firstly ensure an accurate translation of the Chinese legislation into English. The translation of Chinese legislation in the thesis will use the English version of Chinese legislation that has been published academic research. For example, this thesis uses translation of Chinese legal terminologies in the book *Understanding Labour and Employment Law in China*, written by Ronald C. Brown. Moreover, when the thesis uses uniquely Chinese legal terms, the thesis will provide additional explanations of these legal terms, to ensure their clarity. The thesis will also provide the social and legal context of the development of these terms and a detailed explanation of them.

2 *Socio-legal approach*

The thesis adopts a socio-legal approach to complement the doctrinal legal approach. The socio-legal approach explores the influence of law and legal institutions on society.¹⁷⁹ It can be used to reveal inconsistency between the objective of the legislation and the result of the implementation of the legislation. It can also be used to evaluate the influence of non-legal factors on the implementation of the legislation.¹⁸⁰ This “law in context”¹⁸¹ approach in this thesis can thus complement the doctrinal approach’s limitations of subjectivity and its failure to capture the actual working of the law.

The objective of the thesis is to analyse the precarious status of domestic workers and then to provide corresponding legal reform recommendations to address their precarious status. This thesis analyses the defects of the legislation on protecting domestic workers based on the Chinese social context and the actual working of the legislation. The thesis reveals the connection between the legislation and precarious status of domestic workers by integrating the statistics and facts that are revealed in other literature, such as surveys and reports.

In addition, to improve the practicality of the recommendations of the thesis, this thesis will analyse if the legal reform recommendation provided in this thesis conforms to the current level of development of China and coherence of the Chinese legal system. The legal reform recommendations in this thesis also take into account the special characteristics of domestic work and the demand from homeowners and domestic workers.

3 *Comparative legal approach*

The thesis furthermore adopts the comparative legal approach. In particular, it compares the legislation applicable to domestic workers in China with the ILO Domestic Workers

¹⁷⁹ Watkins and Burton, above n 173, at 35-38.

¹⁸⁰ Ibid.

¹⁸¹ Fiona Cownie *Legal Academics: cultures and identities* (Hart Publishing, 2004), at 58.

Convention. This approach combines a comparison of legislation, legal ideas and legal institutions between domestic laws and foreign laws, with the objective of identifying similarities and differences and the reasons behind these similarities and differences.¹⁸² The comparative approach thus contributes to the exchange and mutual understanding among legal systems.¹⁸³ Also, comparative studies contribute to the learning experience in addressing a specific problem from other legal systems.¹⁸⁴ In other words, the experience of addressing specific problems in other legal systems can promote critical thinking and innovation.¹⁸⁵ Therefore, the comparative legal approach can be beneficial to the development of law reform.

On the one hand, the ILO Domestic Workers Convention provides legal protection for domestic workers in accordance with the special character of domestic work from the perspective of giving domestic workers decent work. On the other hand, legislation on the protection of domestic workers is basically lacking in China, who thus could draw experience of developing legal protection for domestic workers from the ILO Convention.

While a comparison between the Chinese legislation and the ILO Domestic Workers Convention can be beneficial to the development of legislation in China, it does not mean that China should blindly accept the Convention. A law that is functional in one social setting might not be functional in a different social setting.¹⁸⁶ There is no evidence proving the ratification of the ILO Domestic Workers Convention can address problems facing domestic workers. Blind acceptance of the Convention not only will not address problems facing domestic workers but may result in new problems. Therefore, although the thesis compares the ILO convention and Chinese legislation, it does not argue that applying the ILO Domestic Worker Convention in China will address the precarious status of domestic workers. Moreover, the thesis does not suggest simply importing the rules from the ILO convention to Chinese legislation; it does, however, support following the fundamental principle of

¹⁸² Masselot, above n 174.

¹⁸³ Watkins and Burton, above n 173.

¹⁸⁴ Otto Kahn-Freund "On uses and misuses of comparative law" 1974 37(1) *The Modern Law Review*

¹⁸⁵ Masselot, above n 174.

¹⁸⁶ Watkins and Burton, above n 173.

protecting domestic workers set out in the ILO convention. The thesis argues that the basic principle of providing domestic workers decent work set out in the ILO convention is in conformity with the requirement of developing legislation for domestic workers in China; however, the thesis also gives recommendations based on the Chinese social and legal context rather than merely copying the rules of the ILO convention.

F Structure of the thesis

The thesis is organised into six chapters. The first chapter introduces the social context of the domestic service industry and domestic workers in China. It argues that giving domestic workers sufficient legal protection will not only contribute to the improvement of the standard of living of domestic workers but also to the development of Chinese society. The second chapter introduces the definition of the domestic worker that is used in this thesis and explains their legal status. Against this background, Chapter Three introduces the concept of a precarious worker in China and argues that domestic workers are typical precarious workers. Chapter Four analyses legal and regulatory factors that result in the precarious status of domestic workers from the perspective of the capability approach. Chapter Five provides legal reform recommendations to address the precarious status of domestic workers. Chapter Six provides a summary of the thesis and outlook for future research.

II Chapter 2 Legal status of domestic workers in China: comparing the ILO Domestic Work Convention with the legislation for domestic workers

The preceding chapter introduces the argument that insufficient legal protection for domestic workers not only contributes to the poor living standard of domestic workers but also hinders the development of Chinese society more generally. Therefore, it is argued that China should address the problem of the insufficient legal protection of domestic workers. While China has not developed systematic legal protection for domestic workers, the International Labour Organisation (ILO) has adopted the Domestic Workers Convention 2011 (No. 189) and Domestic Workers Recommendation, 2011 (No. 201).¹ These two legal documents have been developed to improve the legal protection of domestic workers. This chapter argues that while China has not ratified the Domestic Workers Convention and the ratification would be unable to address the unprotected status of its domestic workers, the principles established in the Convention conforms to the current social and legal development in China. The Convention and the Recommendation thus provide an appropriate direction for China's development its domestic legislation on the protection of domestic workers.

This chapter starts by providing a definition of domestic worker. An accurate definition is the essential starting point in order to identify and address the precarious status of these workers. This chapter compares the definition of domestic worker adopted by the ILO Domestic Workers Convention with the definition under Chinese law. It concludes that the definition in Chinese legislation is too broad to be used to analyse the precarious status of domestic workers. It includes all work that connects to a household. Consequently, it not only includes domestic workers but also contractors, such as matchmakers and home removals, who work in or for a household or households but provide their services independently. Therefore, the thesis needs to clarify the definition of the domestic worker that is used in this thesis.

¹ Domestic Workers Convention, 2011 (No. 189) Geneva, 100th ILC session (16 Jun 2011); Domestic Workers Recommendation, 2011 (No. 201), Geneva, 100th ILC session (16 Jun 2011).

After defining domestic worker, the chapter introduces the demographic characteristics of domestic workers and analyses their legal status in China, in order to provide an overall picture of the composition of the domestic workforce in China. The chapter further explains the Chinese legal terminologies regarding domestic workers. Moreover, the chapter analyses the legal relationship between domestic workers and homeowners, and between domestic workers and domestic service companies. It seeks to explain why domestic workers are unable to obtain sufficient legal protection in their legal relationships with homeowners and domestic service companies. The definition of domestic workers, and the analysis of the legislation applicable to domestic workers, paves the way for the analysis of the precarious status of domestic workers and for the legal recommendation for addressing their precarious status.

A The ILO Domestic Workers Convention is conducive to the development of legal protection for domestic workers in China

At its 100th Session in June 2011, the International Labour Conference adopted the Domestic Workers Convention and Recommendation.² These two documents represent milestones for the promotion of improvements in the working conditions of domestic workers.³ It was the first time that the ILO has adopted international labour standards exclusive to domestic workers. This is significant because this group of workers represents more than 52.6 million individuals around the world.⁴ These standards provide the basis for improving the working and living conditions of tens of millions of domestic workers performing work that has been undervalued historically and traditionally done by women.⁵ These two documents recognise the economic and social value of domestic work and call for action to address the existing exclusion of domestic workers from labour and social protection globally.⁶ This section

² C189 - Domestic Workers Convention, 2011 (No. 189), Geneva, 100th ILC session, 16 Jun 2011; R201 Domestic Workers Recommendation, 2011 (No. 201), Geneva, 100th ILC session, 16 Jun 2011.

³ *ILO Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection* (ILO, Geneva, 2013), at 43.

⁴ *Ibid*, at 2.

⁵ The Preface of the Domestic Workers Convention C189, above n 2.

⁶ *Decent Work for Domestic Workers: Convention 189 & Recommendation 201 at a glance*, at 2.

introduces the contents of these two documents and discusses the potential for China to use these two documents to improve its national law on the protection of domestic workers.

1 Introduction of the ILO Convention 189 and Recommendation 201

In order to compare the Chinese legislation with the ILO Domestic Worker Convention and Recommendation, the chapter starts by introducing these two documents. ILO Convention 189 and its supplementary Recommendation 201, adopted in the 100th session of the International Labour Organisation in 2011, both concern decent work for domestic workers. The Convention and the Recommendation provide international standards for the protection of domestic workers in matters such as remuneration, working conditions, rest, holidays, social security and labour inspection.

Despite their large number, domestic workers have been an invisible and marginalised group in society over much of history.⁷ Their work is not considered to be real work due to the prejudice that domestic work is not productive and does not create profit for families.⁸ Domestic work is also undervalued because it is not seen as a skill, but an innate ability of women.⁹ As a result, of such prejudice toward domestic work, such workers are treated unfavourably in the legal system of many countries.¹⁰

During the 2011 100th ILO International Labour Conference, a representative from the Office of the UN High Commissioner for Human Rights claimed that domestic workers suffer violations of the economic, social and cultural rights stipulated by the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.¹¹

⁷ Natasha Lycia Ora Bannan “Domestic Workers and Their Right to be Heard: Residential Picketing Makes Visible the Invisible” 2011 4 Crit.

⁸ Lisa Diaz-Ordaz “Real Work: Domestic Workers' Exclusion from the Protections of Labor Laws” 2010 19 Buff. J. Gender L. & Soc. Pol'y.

⁹ Ibid.

¹⁰ ILO, above n 3.

¹¹ ILO: Decent work for domestic workers, Report IV(1), International Labour Conference, 100th Session, 2011

Although the current international legislation for human rights protection applies to domestic workers, specific legislation for domestic workers must be established to ensure their enjoyment of these rights.¹² The ILO argues that discrimination against domestic workers in respect of their employment and working conditions represents a violation of human rights.¹³ Therefore, the establishment of new international standards specifically focused on domestic workers is important to protect their human rights. Against such a background, the ILO adopted Convention 189 and its supplementary Recommendation to promote domestic workers' enjoyment of the human rights conventions and to recognise and respect domestic workers rights at work.

Convention 189 seeks equal treatment in legislation between domestic workers and workers in general.¹⁴ It provides fundamental principles and measures concerning the promotion of decent work for domestic workers,¹⁵ and its implementation is generally considered important to the improvement of domestic workers' living and working conditions, promotion of their equal terms of employment, and entitlement to their human rights, basic labour rights and social protection.¹⁶ The Convention comprises a preamble, provisions on definitions of terms and scope of the Convention (Articles 1 and 2), a series of articles establishing substantive standards and obligations (Article 3 to 19), and articles regarding the ratification and termination of the Convention by member states. (Article 19 to 27).

The preface sets the fundamental premise of the Convention, which is that domestic workers are entitled to equality with other workers in all their human rights protections and working conditions. After briefly introducing the challenging circumstances currently facing domestic workers, the preface underlines its target of improving the poor working and living conditions of these workers and entitling them to decent work. To fulfil such a target, the preface stresses

¹² Ibid.

¹³ Ibid, at 21.

¹⁴ The Preface of the Domestic Workers Convention C189, above n 2.

¹⁵ ILO, above n 3, at 43.

¹⁶ Kristin Carls *Decent work for domestic workers: The state of labour rights, social protection and trade union initiatives in Europe* (ACTRAV/ITC-ILO, 2012).

the necessity of allowing flexibility in the implementation of the Convention at the national level.¹⁷

In its main body, the Convention refines the principles set out in the preface. It requires a member state to take measures to ensure the effective promotion and protection of the human rights of all domestic workers and, to respect, promote and realise the fundamental principles and rights at work. These fundamental principles and rights include freedom of association, the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour, and the elimination of employment discrimination.¹⁸

The Convention also provides standards concerning domestic workers' economic and social rights according to the characteristics of domestic work. These standards cover domestic workers' working and living conditions, privacy, working time, remuneration, occupational safety and health, and social security. For specific groups of domestic workers, including child workers, live-in workers and migrant workers, the Convention provides specific standards to reduce their vulnerabilities.

In addition, to ensure effective enforcement of the stipulated standards, the Convention requires the establishment of mechanisms to ensure domestic workers' access to courts, tribunals or other disputes resolution organisations. It also requires member states to provide domestic workers with effective compliance mechanisms and to develop and implement measures to ensure labour inspection for domestic workers.

In contrast to Convention 189, which becomes binding for countries that have ratified it under international law, Recommendation 201 is not binding, but serves as a guide to enhance protection of domestic workers under national laws.¹⁹ The Recommendation supplements the Convention by providing detailed standards regarding protection for domestic workers'

¹⁷ The Preface of the Domestic Workers Convention C189, above n 2.

¹⁸ Domestic Workers Convention C189, above n 2, article 3.

¹⁹ ILO, above n 6, at 7.

economic and social rights and the implementation of these rights. Moreover, the Recommendation provides guides on matters that are not covered in the Convention, including regulation of domestic workers for diplomatic personnel, domestic workers' statistical data collection, professional development, work-life balance, and work and family responsibilities.²⁰

2 The ILO Domestic Workers Convention conforms to the development of legal protection for domestic workers in China

In the 99th session of the International Labour Conference held in 2010, the Chinese delegation was in favour of a recommendation for domestic workers instead of a convention because it doubted the feasibility that a uniform binding standard could suit countries with significantly different economic situations and various levels of development.²¹ In contrast to a convention, which becomes binding for countries which have ratified it under international law, a recommendation is not binding but serves as a guide to enhance protection of domestic workers in national laws.²² Therefore, while the ratification of the Convention will include domestic workers in its coverage of labour laws, China claims that further studies should be carried out on the necessity and feasibility of including domestic workers in the scope of the labour laws.²³

Although China has not ratified the Convention, it does not mean the Convention and the Recommendation are not relevant to China. This section introduces that it is a practice for China to adopt the ILO's rules and standards that match China's social context in order to improve its national legislation. The principles of protecting domestic workers established in these two documents conform to the government's stated aims of social and legal development in China. Therefore, the Convention's rules and standards can be used to facilitate the development of legal protection for them.

²⁰ Ibid, at 7.

²¹ ILO: Decent work for domestic workers, Report IV(2), International Labour Conference, 99th Session, 2010.

²² ILO, above n 6, at 7.

²³ ILO, above n 21.

The current Chinese government has had extensive cooperation with the ILO since 1983.²⁴ China's adoption of ILO's conventions is generally considered to be positive.²⁵ The ILO has contributed to the development and the modernisation of Chinese labour protection legislation.²⁶ ILO principles have been transposed into the Chinese legal system and have provided directions for China to develop its national legislation.²⁷

Firstly, China has used labour protection standards from both ratified and unratified ILO conventions to improve its domestic labour protection law.²⁸ For example, the development of the Labour Law and the Labour Contract Law has drawn experiences from ratified ILO conventions concerning matters such as weekly rest, the minimum wage, special protection

²⁴ China is one of the ILO's founders; however, the cooperation between the ILO and the current Chinese government started in 1983. From the establishment of the Peoples' Republic of China from 1949 to 1971, China was represented by the Republic of China (ROC) in the United Nations (UN). Consequently, there was no relationship between mainland China and the ILO during this period. This status was not changed until 25 October 1971 the UN recognized the PRC as the sole legal China in the General Assembly Resolution 2758. After being recognised, China did not start its involvement in the ILO immediately. In 1983, after the ILO director general, Francis Blanchard, twice visited China to discuss its closer participation and the ILO agreed to cancel the accrued debt (U.S.\$37,220,652), representing China's statutory contribution due since 16 November 1971 and the arrears owed by Taiwan (U.S.\$1,624,059), China started its participation in the ILO.

²⁵ Chunlin Li “国际劳工标准的导入与和谐社会的构建” 2006 3 *Issues of Contemporary World Socialism* (The Relationship between the Transplantation of International Labour Standards and the Development of Harmonious Society in China); Dongmei Liu “论国际机制对中国社会保障制度与法律改革的影响——以联合国, 国际劳工组织和世界银行的影响为例” 2011(5) *Journal of Comparative Law* (The Influence of International Mechanisms on the Social Protection and Legal Reform in China: take the United Nation, the International Labour Organisation and the World Bank as Examples); Yumin Li, Hao Jin and Zhongzhong Zhu “国际劳工组织对中国社会保障体系构建的影响” 2014(5) *Market Forum* (International Labour Organisation's Influence on the Development of Social Protection System).

²⁶ Ann Kent “China, international organizations and regimes: the ILO as a case study in organizational learning” 1997 *Pacific Affairs*.

²⁷ Shunzhang Zhao “国际劳工组织的核心劳工标准与我国有关劳动立法的比较研究” 2004(4) *上海工会管理干部学院学报: 工会理论研究* (The Comparative Research of Key Labor Standards of the International Labour Organization and the Labour Protection Law of in China); Liu, above n 25.

²⁸ Liu, above n 25, at 27.

for females, and restrictions on employing child workers.²⁹ In contrast, although China has not ratified the 1930 Forced Labour Convention³⁰ and the 1957 Abolition of Forced Labour Convention,³¹ the principles of these two conventions are reflected in the Chinese Constitution, the Criminal Law, the Labour Law, the Labour Contract Law and the Law on the Protection of Women's Rights and Interests.³² China's abolition of the Re-education Through Labour System also reflects the effect of the Forced Labour Convention on Chinese legislation.³³

Secondly, ILO guidelines³⁴ provide standards for China to improve its guidelines or develop new guidelines. For example, Chinese Standards on Occupational Safety and Health Management Systems (GB/T28001 — 2001)³⁵ and the guidance on these systems³⁶ are developed in accordance with the ILO guidelines on occupational safety and health management systems (ILO-OSH 2001 SH 2001).³⁷

Thirdly, cooperative programs between China and the ILO have contributed to the improvement of the labour protection law in China. Through cooperation between the ILO

²⁹ Zilu Nie “国际劳动立法与我国劳动法制的完善” 2008 29(4) *The Theory and Practice of Finance and Economics* (International Labour Legislation and the Improvement of Chinese Labour Law System), at 121-123.

³⁰ Forced Labour Convention, 1930 (No. 29), Geneva, 14th ILC session, 28 Jun 1930.

³¹ Abolition of Forced Labour Convention, 1957 (No. 105), Geneva, 40th ILC session, 25 Jun 1957.

³² Wenfang Wu “国际劳动标准对我国自贸区规则的冲击及应对” 2014 16(3) *Journal of Shanghai University of Finance and Economics* (The Impact of International Labor Standards on Rules in Chinese (Shanghai) Pilot Free Trade Zone and Response to the Impact) at 16; Ye Tian and Jing Lin “国际劳工标准与中国劳动治理——一种政治经济学分析” 2009(5) *World Economics and Politics* (The Analysis of International Labour Standards and Labour Governance in China from the Perspective of the Political Economy), at 14; Liu, above n 25, at 26-28.

³³ Wu, above n 32, at 17.

³⁴ ILO's guidelines provide general guidance relating to particular areas of interest.

³⁵ Standards on Occupational Safety and Health Management Systems (职业安全卫生管理体系规范)(China), General Administration of Quality Supervision, Inspection and Quarantine of the PRC, Standardisation Administration of the PRC, 2001.

³⁶ Guideline on Occupational Safety and Health Management(职业安全健康管理体系指导意见), State Economic and Trade Commission of the PRC, 20 December 2001.

³⁷ Li, Jin and Zhu, above n 25, at 18.

and the Chinese government or between the ILO and Chinese organisations, the ILO's expertise on employment is used to pursue improvement in employment promotion, social protection, and social dialogue, to promote employment of youth and laid-off workers³⁸, to improve the productivity and working conditions of small and medium-size companies, and to empower workers with disabilities or HIV.³⁹ For example, the ILO and the Ministry of Labour and Social Security conjointly conducted an assessment program for social protection in 2001 and, on the basis of this assessment, developed a guideline for improving social protection in China.⁴⁰

Despite the ILO's contribution to the development of labour protection in China, China does not ratify ILO conventions indiscriminately; instead, its ratification of ILO conventions is based on its national context.⁴¹ The adoption of the ILO convention without due regard to its national context can lead to the failure of implementing such legislation.⁴² Moreover, such adoption may affect the autonomy of the Chinese State and its economic development.⁴³ Labour protection is linked to social policy, which is developed in accordance with a governmental or political setting.⁴⁴ However, against the background of globalisation, the influence of a country's social policy transcends the geographic boundaries of that country.⁴⁵

³⁸ In the 1990s, the Chinese government carried out the reform of state-owned enterprises. This reform led to the retrenchment of millions of workers in China. See Yongshun Cai "The resistance of Chinese laid-off workers in the reform period" 2002 170 *The China Quarterly*, 327-344.

³⁹ ILO "The ILO in China" (2015) at : http://www.ilo.org/beijing/what-we-do/publications/WCMS_430205/lang-en/index.htm.

⁴⁰ Li, Jin and Zhu, above n 25 , at 19.

⁴¹ Jie Qiu "国际劳工标准研究综论" 2004(5) *China Labor* (Introduction of International Labour Standards), at 33.

⁴² Hong Wang "我国应对国际劳工标准研究——兼谈国际劳工标准的国际法性质" 2008(5) *Seeker* (A Study of the Adoption of International Labour Standards in China and the Legal Status of International Labour Standards in the International Law).

⁴³ Liping Zhang "国际劳工标准, 国际贸易与我国劳工标准" 2006(2) *Journal of Guizhou Normal University* (Social Science) (International Labour Standards, International Trade and Chinese Labour Standards).

⁴⁴ Xinping Guan *社会政策概论* (Higher Education Press, 2009) (Introduction of Social Policies) .

⁴⁵ Daniel A Morales-Gómez *Transnational social policies: The new development challenges of globalization* (IDRC, 1999), at 32.

Globalisation may also create a supranational standard for labour protection.⁴⁶ If a country does not improve its low labour protection standards, it may represent a place of social dumping by other countries.⁴⁷ Although such a standard can promote the improvement of labour protection worldwide,⁴⁸ applying a universal standard to different countries can be counterproductive given that different countries might have very diverse level of economic and social development.⁴⁹ A universal standard developed in accordance with the national context of post-industrial countries may thus lead to an economic and political crisis for those less developed countries.⁵⁰

The above introduction of the relationship between China and the ILO reveals that it is common practice for China to adopt rules from the ILO conventions to improve its legal protection legislation. As discussed in Chapter One, China should develop sufficient legal protection for domestic workers. The principles established in the convention for protecting domestic workers conform to such requirements of China. Therefore, the rules and standards in the Domestic Worker Convention, which meet China's progress of social development, can facilitate the development of legal protection for domestic workers in China.

While China can draw experience from the ILO Domestic Worker Convention concerning the development of legal protection for domestic workers in China, it does not mean that applying the convention in China can address the precarious status of domestic workers there. China needs to modify the rules and standards in the Convention so that these rules and standards

⁴⁶ Jingyi Ye and Qian Wei “《经济、社会和文化权利国际公约》与劳动权的保护” 2004 Vol.41(2) Journal of Peking University (Philosophy and Social Sciences) (The International Convention on Economic, Social and Cultural Rights and Labour Right Protection);

⁴⁷ Christopher L Ericksno and Sarosh Kuruvilla “Labor costs and the social dumping debate in the European Union” 1994 48(1) ILR Review , at 29-30.

⁴⁸ Krzysztof Drzewicki “The right to work and rights in work” 2001 Economic, Social and Cultural Rights. La Haya: Kluwer Law International, at 226.

⁴⁹ Yunxia Yu “国际劳工标准: 演变与争议” (Doctoral Thesis, China Foreign Affairs University, 2005) (International Labour Standard: Evolution and Disputes) ,at 391.

⁵⁰ Yefang Qian “保护不足与保护过度——试论《中华人民共和国合同法》倾斜保护的“度”” 2007(3) Studies in Law and Business (Inadequate Protection or Overprotection: Legal Protection in the Labour Contract Law of PRC) , at 40-41.

match the Chinese context. The next section clarifies the definition of domestic worker that is used in the thesis. The analysis in this section implies that China cannot copy rules from the Domestic Workers Convention, but it needs to modify these rules in accordance with its social context.

B Definition of the domestic worker in China

A precise definition of the term “domestic worker” in China will help clarifying the objective of analysis of this thesis. In order to provide recommendation for legal reform to address the precarious status of domestic workers, the analysis must formulate and utilise an accurate and precise definition of domestic worker that reflect their characteristics and situation in China. However, as yet there is no uniform definition of domestic worker in China. Different definitions are prescribed in both ministry regulations and local regulations; the lack of a uniform definition at the national level thus hinders the development of uniform legal protection for domestic workers.

Moreover, the current ambiguous and broad definitions of domestic worker in China mean that these definitions can neither be used to usefully analyse the precarious status of these workers nor reflect their common vulnerabilities. Thus such definitions cannot be used to develop corresponding legal protection. In addition, an ambiguous definition could lead to the inclusion of non-domestic workers, who would thus be able to obtain legal protection, which is specifically developed to counteract the vulnerabilities of domestic workers. Therefore, an ambiguous definition could lead to the overprotection of non-domestic workers. For example, providing a contractor who does not have a lower bargaining power than homeowners with the legal protection for domestic workers may result in the disadvantaged status of homeowners.

Unlike the broad and ambiguous definition of domestic worker in China, the ILO Domestic Workers convention limits the definition of domestic workers to those who have established an employment relationship with a householder and excludes workers who are not domestic

workers on an occupational basis.⁵¹ This section analyses the impracticality of applying the definition adopted by the ILO Domestic Workers Convention to the Chinese social context. Moreover, the section defines the domestic worker in this thesis.

1 China should exclude workers who have established an employment relationship from the definition of the domestic worker

The ILO Domestic Workers Convention confines the definition of domestic workers to those who are in an employment relationship with homeowners and excludes those who only work occasionally or sporadically and not on an occupational basis.⁵² Such a definition thus excludes workers who provide care services in institutions such as orphanages, kindergartens, hospitals, and old-age retirement homes which are arguably part of a broader care economy.⁵³ Although researchers such as Einat Albin Manuela Tome and Patrick Belser criticise such exclusion as being too restrictive and against the convention's purpose of protecting domestic workers,⁵⁴ this thesis argues that excluding these workers who have established an employment relationship with other companies matches the Chinese social context. Reasons for the exclusion are as follows:

Firstly, the majority of workers who carry out domestic work in China have not established an employment relationship with any entities.⁵⁵ Domestic service companies do not usually

⁵¹ In the definition adopted by the ILO Domestic Worker Convention, (a) the term “domestic work” means work performed in or for a household or households; (b) the term “domestic worker” means any person engaged in domestic work within an employment relationship; (c) a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker.

⁵² Ibid.

⁵³ Shahra Razavi and Silke Staab “Underpaid and overworked: A cross-national perspective on care workers” 2010 149(4) International Labour Review.

⁵⁴ Einat Albin and Virginia Mantouvalou “The ILO Convention on Domestic Workers: From the Shadows to the Light” 2012 41(1) Industrial Law Journal, at 73-74; Manuela Tomei and Patrick Belser “New ILO standards on decent work for domestic workers: A summary of the issues and discussions” 2011 150(3-4) International Labour Review at 434.

⁵⁵ Shuhai Zhao and others “北京家政服务业的现状及其规范性发展” 2010(57) Review of Economic Research (Current Situation and Standardisation of the Domestic Service Industry in Beijing), at 44.

establish employment relationships with domestic workers, due to the cost of providing labour protections to domestic workers.⁵⁶ According to Wang's survey, 99 per cent of domestic service companies in Shanghai do not establish employment relationships with domestic workers;⁵⁷ similarly, Shao and Meng found that the number of domestic service companies that establish an employment relationship with their domestic workers is less than five per cent.⁵⁸ Even among those few domestic service companies that establish an employment relationship with their workers, usually this is only with regard to management staff.⁵⁹ Therefore, excluding this group of workers from the definition of domestic workers affects only a small number of workers in China.

Secondly, workers who have established an employment relationship with domestic service companies do not have the same level of precariousness as that of domestic workers, because they can claim legal protection in accordance with the general labour protection law in China. One main reason for domestic workers' precariousness is that they are not protected by existing labour legislation. In contrast, workers who have established an employment relationship with domestic service companies are covered by labour law. Although having legal entitlements does not guarantee their enjoyment of legal entitlements in practice,⁶⁰ domestic worker's enjoyment of legal entitlements is often affected negatively by the fact that they work in private households,⁶¹ even if these workers are not totally excluded from the

⁵⁶ Lin Zhang and Yi Yang "人口新常态背景下农村家政女工生存与发展现状调研——基于北京、广州、武汉、西安的样本分析" 2016(5) Hubei Social Sciences (An Survey of the Living Condition of Migrant Domestic Workers from Rural Areas in the Context of the Population New Normal), at 56; Ruijie Wang "上海市家庭服务业现状分析与规范化建设" 2011(5) Scientific development (Analysis of the Current Situation of the Domestic Service Industry and Its Standardisation), at 95-96.

⁵⁷ Wang, above n 56, at 95.

⁵⁸ Xingdong Shao and Xianzhong Meng "转型期家政行业 "准员工制" 管理研究——以上海为例 " 2014(21) Human Resources Development of China (Research on the Management of "Quasi-employment Mode" Domestic Service Companies in the Transitional Period: Take Shanghai as an Example), at 98.

⁵⁹ Wang, above n 56, at 95.

⁶⁰ Robert F Castro and George M Dery III "Emancipating Law and Liberating Lives: Making California's Enforcement of AB 241 More Accessible and Muscular for Domestic Workers" 2014 17 Harv. Latino L. Rev.; Tomei and Belser, above n 54, at 437-438.

⁶¹ Ibid.

labour protection. In other words, even though these workers constitute only a small number of people in China, excluding them from the definition of the domestic workers does not deprive them of their right to obtain legal protection.

Thirdly, including workers who have established an employment relationship with domestic service companies and other entities under the definition of domestic workers would lead to conflicts between different laws in China. When workers are employed by a company and then assigned to households, these workers are only representatives of the domestic service companies. The relationship between the workers and the household is essentially a relationship between the domestic service companies and households. Since the relationship between the domestic service companies and homeowners is a relationship between service providers and consumers, the relationship between these workers and the homeowners is thus governed by the Law on the Protection of Consumer Rights and Interests.⁶² Consequently, covering these workers who have an established employment relationship under the definition of the domestic worker would also lead to the relationship between domestic service companies and homeowners being governed by the legislation on the protection of domestic workers. While the Law on the Protection of Consumer Rights and Interests protects homeowners, the legislation on the protection of domestic workers protects domestic workers. It means that the relationship between homeowners and domestic service companies would be governed by two laws, if China includes these workers under the definition of the domestic worker. The different essential objectives of these two laws will likely lead to conflicts.

2 The incompatibilities of the ILO definition of domestic workers in the Chinese social context

The preceding analysis explains that excluding workers who have established an employment relationship with domestic service companies or other entities does not deprive them of their

⁶² Law of the PRC on the Protection of Consumer Rights and Interests (中华人民共和国消费者权益保护法), adopted at the Fourth Meeting of the Standing Committee of the Eighth National People's Congress and promulgated by Order No.11 of the President of the PRC on October 31, 1993

legal entitlement and avoids conflict between laws. However, it does not mean that the ILO definition of domestic workers matches the Chinese social context adequately. This thesis argues that applying the definition of domestic work adopted by the ILO convention in China would result in the inclusion of non-domestic work. Moreover, it argues that applying the definition of domestic worker adopted by the ILO convention in China would exclude the majority of domestic workers from the definition of domestic worker.

The Convention defines domestic work as *work performed in or for a household or households*.⁶³ This definition catches the main characteristic of domestic work conducted in a private home. It also covers work that is not performed in the household, but is an extension of household work, such as private driver or gardener. However, this definition is too broad to be used as a practical definition of domestic work in China. Applying such a definition will cover not only domestic workers but also workers in small businesses that are operated within households.

Traditionally, a large number of small businesses, such as handicrafts and cloth manufacturing businesses, are operated in households in China.⁶⁴ The owners of these small businesses do not typically establish an employment relationship with their workers.⁶⁵ However, these types of work are not domestic work. They are no different from work in factories except that the work is done in private households. These workers should thus be protected by the Chinese Labour Law. Moreover, along with the development of the internet economy, an increasing number of internet-related businesses, such as small size e-commerce and online podcast streaming, are operating within households. The owners of these businesses may hire workers to sell their products or services. Although the work is performed in private households, the work is not domestic work. These workers are essentially employees of the business owners

⁶³ Domestic Workers Convention C189, above n 2, Article 1(a).

⁶⁴ Jinzheng Li “传统与变迁: 近代冀中定县手工业经营方式的多元化” 2009(1) Nankai Journal: Philosophy, Literature and Social Science Edition (Tradition and Transformation: the Diversity of Handicraft Businesses in Dingxian in the Modern period).

⁶⁵ Yu Xie “日薪制与新型劳资关系的建构——广东 S 镇农民工劳务市场调查” 2015 2(6) Sociological Review of China (The Daily Wage System and Construction of New Employee-employer Relation: A Case Study of Migrant Workers in the Labour Market in Town S of Guangdong Province).

and they should also be protected by the Chinese Labour Law. Applying the ILO definition of domestic work in China will lead to the inclusion of these abovementioned non-domestic jobs under the definition of domestic work. Including non-domestic work to the definition not only does not conform with the concept of domestic work in Chinese society, but also is detrimental to the identification of common vulnerabilities of domestic workers.

Using the establishment of an employment relationship between domestic workers and homeowners as a standard to distinguish domestic workers from other workers will exclude the majority of domestic workers from the definition of domestic worker. The ILO Domestic Worker Convention stipulates that only workers who are engaged in domestic work within an employment relationship are domestic workers.⁶⁶ Such a limitation on the definition of the domestic worker reflects domestic workers' subordination to households in a relationship between domestic workers and homeowners. It thus helps to distinguish domestic workers from independent contractors. However, applying such a limitation in China will exclude the majority of domestic workers from the definition of the domestic worker. According to the Labour Law of China, employment relationships cannot be established between natural persons.⁶⁷ This means that an employment relationship cannot be established between domestic workers and homeowners. Consequently, limiting the definition of the domestic worker to workers who have established an employment relationship with householders is not practical in China.

Excluding workers who engage in domestic work occasionally can also lead to the exclusion of a large proportion of domestic workers in China. ILO definition excludes workers who work only occasionally or sporadically and who do not work on an occupational basis.⁶⁸ Such a limitation excludes workers who do not live on domestic work. Workers who do not carry out domestic work on an occupational basis usually have other sources of income; they thus

⁶⁶ Domestic Workers Convention C189, above n 2, article 1.

⁶⁷ The reason why an employment relationship cannot be established between natural persons is explained in the section of the introduction of the labour protection law in China.

⁶⁸ Domestic Workers Convention C189, above n 2, article 1.

are less vulnerable than domestic workers who rely on domestic work for a living. Therefore, excluding these workers avoids providing these workers with inappropriate legal protection.

However, the unpredictability of work time of domestic workers, and the fact that in China domestic workers may work for several homeowners in the same period, means that such a limitation can lead to the exclusion of a large proportion of domestic workers from the definition. Domestic work has a high level of unpredictability. Domestic workers may be able to obtain full-time job opportunities when the demand for domestic services in the market is high, while they may only be able to work a few hours when the demand for domestic services is lower than the supply.⁶⁹ When domestic workers cannot obtain enough work hours, they need to find other sources of income, such as cleaning jobs in companies, so that they can earn enough money to afford their living expenses and that of their family. These workers may thus only perform domestic work occasionally during the period when there are not enough work opportunities in the domestic service industry. However, it does not necessarily mean that domestic workers are less vulnerable when they do not work fulltime. They may even be more vulnerable to infringements because of their lack of income. They may need to compromise their legal rights so that they can obtain and maintain job opportunities.⁷⁰ In addition, domestic workers may work for several homeowners in the same period.⁷¹ This means that even fulltime domestic workers may only work occasionally for each homeowner. Therefore, excluding workers who engage in domestic work occasionally from the definition of the domestic worker will lead to the exclusion of a large proportion of domestic workers in China.

⁶⁹ Haiyan Yang “家政服务发展困境及其突破路径” 2013(5) Reform and Development (Predicament of the Development of the Domestic Service Industry and Solutions), at 85.

⁷⁰ Yanmei Li “我国家政服务业的现状分析与规范化建设” 2008(7) Social Scientist (Analysis of the Existing Problems in the Domestic Service Industry), at 109.

⁷¹ Liang Zhang and Anqi Xu “家政从业人员的权益保障及社会支持-以上海家政服务为例” 2011 2011(2) Journal of Social Sciences (The Legal Protection and Social Support for Domestic Workers--Take the Domestic Service in Shanghai as An Example), at 84; Zengyi Xie “超越雇佣合同与劳动合同规则——家政工保护的立法理念与制度建构” 2012 6(6) Tsinghua Law Journal (Transcending Principles of Employment Contract and Labour contract - the Development of Institution for Domestic Workers), at 75.

The preceding analysis of the consistency and inconsistency between the ILO definition of the domestic worker and the Chinese social context reflects that while China could draw experience from the ILO definition, it could not simply apply the ILO definition to domestic workers in China. On the basis of the preceding analysis, the rest of this section outlines the definition of the domestic worker that is used in this thesis.

3 The definition of the domestic worker in this thesis

As discussed at the beginning of this section, there is no definition of the domestic worker in the Chinese legal documents that can be used to develop legal protections for domestic workers. Since the objective of the thesis is to provide legal recommendations for the protection to domestic workers, the definition of the domestic worker must reflect the common disadvantaged status of this group of workers, so that legal protection can be developed in accordance with their vulnerabilities. Therefore, such a definition can neither be too broad nor be too narrow. While a broad definition of domestic workers leads to the overprotection of workers who are not as vulnerable as domestic workers, a narrow definition results in the exclusion of some domestic workers.

Firstly, this thesis defines domestic work as work that is performed in or for a household or households but which does not generate profit for the household or households directly. As discussed previously in this chapter, applying the ILO definition of domestic work in China will lead to the inclusion of non-domestic work. Therefore, China should set a definition of domestic work that distinguishes non-domestic work performed in or for households from domestic work. A key difference between domestic work and business activities performed in households is that domestic work does not create profits directly for homeowners. Householders may have more time to spend making profits as a result of the convenience provided by domestic workers. Domestic workers may thus contribute to creating profit indirectly for homeowners because their work saves householders time and energy that would be used for domestic work. However, their work does not generate profits for the homeowners directly. In contrast, the objective of the owner of other businesses hiring workers is to

generate profits through approaches such as facilitating the sale of products or services. Therefore, such a definition distinguishes domestic work from other work carried out in households.

Secondly, this thesis defines domestic workers as people who are engaged in domestic work under the instruction and supervision of households. The preceding section explained that excluding workers who have not established an employment relationship with homeowners and who do not perform domestic work on an occupational basis leads to the exclusion of all domestic workers in China. Therefore, the definition should avoid the employment relationship issue while still being able to distinguish domestic workers from contractors who work in or for a household or households.

Limiting domestic worker to workers who work under instruction and supervision avoids the exclusion that would result from using the establishment of an employment relationship between domestic workers and homeowners as a standard to distinguish domestic workers from other workers. Although specific criteria defining whether a worker is working under the instruction and the supervision of homeowners still need to be developed, the definition distinguishes domestic workers from contractors, such as matchmakers and home removalists, who work in or for a household or households but provide their services independently.

Thirdly, the definition of the domestic worker used in this thesis does not exclude workers who perform domestic work only occasionally. It thus avoids the difficulty of developing a practical standard to decide whether a worker performs domestic work on an occupational basis, and it avoids the exclusion of a large proportion of domestic workers from the definition. However, the inclusion of occasional domestic workers can lead to an ambiguous boundary between domestic workers and other workers. The ambiguous boundary may thus enable non-domestic workers to misuse the entitlements that are developed to protect domestic workers. In other words, if other workers wanted to obtain legal rights developed exclusively for domestic workers, they would only need to carry out domestic work for a few hours. To avoid this issue, this thesis will consider such a factor when it provides legal reform recommendations for the protection of domestic workers.

1 Demographic characteristics of domestic workers in China

The demographic characteristics of domestic workers not only reveal who domestic workers are in China, but they also contribute to explaining their low socioeconomic status and their low bargaining power. Domestic workers in China have four key demographic characteristics: they are internal migrant, typically female, with low educational background, and relatively older workers.

A common demographic characteristic of domestic workers is their internal migrant worker status. According to a survey conducted jointly by the Ministry of Finance, All-China Federation of Trade Unions and the Ministry of Commerce, more than 60 per cent of domestic workers are internal migrants, typically from rural areas.⁷² The direct problem of being migrant workers is that they lack a social network.⁷³ They do not have reliable friends or relatives to support them when they face problems in cities, which are far from their hometowns.⁷⁴ Another problem is that they cannot access the same social benefits as locals in the city, in which they work.⁷⁵ For example, although compulsory public education is officially free,⁷⁶ in practice migrant workers cannot access free public compulsory education

⁷² Minister of Finance and All-China Federation of Trade Unions Minister of Commerce 商务部 财政部 全国总工会关于实施“家政服务工程”的通知 (Circular about Implementation of the "Domestic Service Project").

⁷³ Kaojin Zhu “城市农民工心理研究——对南京市 610 名农民工的调查与分析” 2003(6) Youth Studies (Research on the Psychology of Migrant Workers from Rural Areas: a Survey and Analysis of 610 Migrant Workers in Nanjing City), at 10.

⁷⁴ Xinxiang Chen “新生代农民工精神文化生活的现状与改善对策——基于泉州地区的实地调查” 2013(1) Journal of Shaanxi University of Technology (Social Sciences) (The Current Situation and the Improvement of the Cultural Life of New-generation Migrant Workers in China: an Empirical Study in Quanzhou City), at 63-64.

⁷⁵ Feng Tian “城市工人与农民工的收入差距研究” 2010 2 Sociological Studies (Research on the Income Disparity between Workers from Urban Areas and Workers from Rural Areas); Yu Zhu and others “农民工: 一个跨越城乡的新兴群体” 2005 29(4) Population Research (Migrant Workers in China: Spanning Rural and Urban Areas), at 37.

⁷⁶ Compulsory Education Law of the People's Republic of China(中华人民共和国义务教育法), entered into force 1 July 1986, amended 29 December 2018.

for their children in the cities in which they work because their household is registered in a different location.⁷⁷

The second common characteristic is their low educational background. According to a survey of domestic workers in Shanghai, 15 per cent of these workers have no formal educational background, 29.33 per cent of them only have a primary school diploma, 33 per cent of them have a middle school diploma, and 22.67 per cent of them have a high school or vocational school diploma.⁷⁸ A large proportion of domestic workers also do not have the most basic occupational and safety training. According to Zhang and Yang's survey in 2016, 51 per cent of migrant domestic workers have not received any form of safety and occupational training.⁷⁹

Without proper education and occupational training, legal awareness and enforcement are unlikely.⁸⁰ For example, some domestic workers think that a contract is a “lock” that prevents them from quitting the job, rather than a protection.⁸¹ Moreover, they also do not know how to defend themselves against the violation of those rights. According to a survey in Shanghai, when domestic workers face unfair treatment, 90 per cent of domestic workers choose to resign or to tolerate the treatment.⁸²

⁷⁷ Chapter three introduces the relationship between household registration and the access to free public compulsory education in more detail.

⁷⁸ Xiaoxiao Jiao and Hua Wang “人力资本, 职业培训与家政从业人员工资收入——基于上海市调查数据的分析” 2016 17(4) *Journal of Shanghai Business School* (Human Capital, Occupational Training and Income of Domestic Workers), at 45; similar results can be found at: Wang, above n 56, at 93; Jianping Guo, Bingtai Cao and Shengshuai Luo “改善江苏省家政服务业发展状况的对策探究” 2011(1) *Jiangsu Commercial Forum* (Research on the Improvement of the Domestic Service industry in Jiangsu Province), at 37.

⁷⁹ Zhang and Yang, above n 56, at 55.

⁸⁰ Xintong Chen “唐山市家政工人就业状况调查” 2015 27(5) *Journal of Shijiazhuang Vocational Technology Institute* (Survey of the Employment Status of Domestic Workers in Tangshan City), at 41.

⁸¹ Dawu Hu “我国发达地区家政服务员劳动权益保障的法律思考” 2011 128(5-6) *Journal of Henan Administrative Institute of Politics and Law* 135 (Analysis of the Legal Protection for Domestic Workers in Developed Regions in China).

⁸² Xianzhi Wang *Investigation Report of Domestic Workers in Shanghai* (Lanzhou University, Lanzhou, 2010).

The third characteristic is that most domestic workers are usually female. There are very few male domestic workers. According to Zhang and Yang's survey of domestic workers in Beijing, Guangzhou, Wuhan, and Xi'an, only four per cent of domestic workers in these four cities are male workers.⁸³ The social construction of women's subservient condition makes them more vulnerable to abuse. For example, women are still perceived primarily as "carers", rather than as "workers" with full employment rights.⁸⁴ This may make people take the precariousness of women's jobs for granted. It may also cause female domestic workers to give up fighting against abuse. Moreover, female workers' physical disadvantages compared with male workers also make them more vulnerable to bullyings, such as verbal and physical abuse and unpaid wages from homeowners.⁸⁵

The fourth characteristic is their older age relative to other workers. Workers in this sector are older on average than the general service workforce: after analysing the data of more than 250,000 domestic workers in the same four cities, Yun Jia Zheng found that most of China's domestic workers are in the 40 to 50 old age group,⁸⁶ whereas the average age of workers in China was 37.62 in 2017⁸⁷ and the average age of general service workforce was around 30

⁸³ Zhang and Yang, above n 56, at 53.

⁸⁴ Eugenia Caracciolo di Torella; and Annick Masselot "Work and Family Life Balance in EU Law and Policy 40 Years on: Still Balancing, Still Struggling" 2013 2013(2) European Gender Equality Law Review 6, at 13.

⁸⁵ Zhuo Chen "家政女工依法维权的经验研究——以 11 位在京从事家政服务的农村女性为例" (LLM Dissertation, China Youth University for Political Sciences, 2010) (Female Domestic Workers' Experience of Protecting Their Rights---an Empirical Research of 11 Migrant Domestic Workers in Beijing).

⁸⁶ Available at the website of Yun Jia Zheng: <http://www.yunjiazheng.com/article/view-102.html>; similar results can be found at: Hongfang Wang "非正规就业——家政服务员权益问题研究" 2006 12(2) Journal of Chongqing University (Social Science Edition), at 73; Chen, above n 80, at 40.

⁸⁷ He Cai 中国劳动力动态调查: 2017 年报告 (Social Science Academic Press (China), Beijing, 2017) (Dynamic Survey of Workforce in China: Report of 2017).

in 2017.⁸⁸ Their relatively old age, together with lack of proper education, contributes to their lack of willingness to obtain new knowledge.⁸⁹

These above-mentioned characteristics have contributed to placing domestic workers in a precarious situation. Therefore, in order to ensure the practicality of developing and implementing legal protection for these workers, China should consider their demographic characteristics.

C Legal status of domestic workers in China

In addition to the abovementioned demographic characteristics, domestic workers lack access to labour protections, which in turn contributes to their disadvantaged status. This section discusses the implications of the triangular legal relationships between domestic workers, homeowners and domestic service companies. It analyses the reasons why domestic workers can obtain labour protection neither in their relationship with homeowners nor with domestic service companies.

1 Introduction of the Chinese legal system

This first section provides a brief outline of the Chinese legal system. An introduction of the Chinese legal system is important to offer a contextual analysis of legislation applicable to

⁸⁸ Ling Nie and others “北京市服务业从业人员健康信息素养调查分析” 2017(11) Chinese Journal of Health Education (Study on Health Information and Educational Background of Domestic Workers in Beijing), at 984; Jiangxia Yu “重庆传统商贸服务业从业人员结构分析与对策研究” 2017 36(5) Logistics Technology (Personnel Structure of Traditional Trade Service Industry in Chongqing: Analysis and Countermeasures), at 42.

⁸⁹ Xianghong Ju “农民工参与继续教育学习意愿的影响因素分析——基于 Logistic 回归模型的验证” 2013 31(3) Journal of Distance Education (The Analysis of Influencing Factors Regarding Migrant Workers' Willingness of Receiving Further Education: Based on the Verification of Logistic Regression Model), at 99; Delin Huang and Yongjie Chen “农民工职业技能培训意愿及影响机理研究——基于武汉市, 厦门市, 沧州市的实证调查” 2014(3) China Soft Science (The Research on the Willingness of Migrant Workers to Participate Vocational Skill Training: Based on the Empirical Investigation in Wuhan, Xiamen and Cangzhou City), at 74.

domestic workers, and for legal reform recommendations to address the precarious status of domestic workers in China.

The Chinese legal system consists of both formal and informal sources of law.⁹⁰ The formal resources of the law of the Chinese legal system can be categorised into seven branches of law, which include constitutional law, civil and commercial law, administrative law, economic law, social law, criminal law, and procedural law.⁹¹

In addition, informal sources of law are also a part of the Chinese legal system. Generally speaking, three types of informal sources of law are widely used in China: customs, policies of the ruling party or government, and guidance or typical cases published by the Supreme Court.⁹² Informal sources of law, such as precedents, policies, legal theories, and ethical principles, have no binding force and cannot be used to judge cases.⁹³ However, these informal sources can guide people's behaviours and facilitate a correct application of formal sources of law, especially when formal sources of law are unable to adjust social relationships effectively.⁹⁴ Moreover, informal sources of law can reflect the common expectations of society.⁹⁵ For example, although ethical principles do not have legal force, all members in a society are expected to follow these principles.⁹⁶ Therefore, these informal sources of law

⁹⁰ Guangjie Zhang *中国法律概论* (Fudan University Press, Shanghai, 2005) (Introduction of Chinese Law) , at 37-38.

⁹¹ Peng Li 全国人民代表大会常务委员会工作报告——2001年3月9日在第九届全国人民代表大会第四次会议上 (The Work Report of the National People's Congress Standing Committee—the Fourth Meeting of the Ninth National People's Congress on 09 March 2001).

⁹² Zhang, above n 90, at 40.

⁹³ Guochun Wang “法律渊源的概念与类型划分” 2000 1 *Journal of Hengyang Normal University (Social Science)* (Definition and Classification of Legal Sources), at 15-16.

⁹⁴ *Ibid.*

⁹⁵ Wei Teng “司法裁判中非正式法源之适用——以民意为主要研究对象” 2009(00) *Law and Modernization* (The Application of Informal Legal Sources in the Court: Take Public Opinion as an Example).

⁹⁶ Haoming Sun and Fangxing Ye “立法视域中的道德法律化” 2010 26(4) *Journal of West Anhui University* (Legalisation of Moral Standards).

may become formal sources of law after they are adopted in the legislation.⁹⁷ Therefore, the development of new law should also consider the influence of these informal sources of law.

2 *Introduction of labour protection law and civil law*

Analysis of the legal status of domestic workers in China involves two streams of law namely: labour protection law and civil law. The labour law in China relates to the legal protection of workers who have established a labour relationship⁹⁸ with an employer. Domestic workers do not have an official employment status, they are thus excluded from the labour protection law. However, the comparison between the legal protection available to domestic workers and other workers reveals the overall inadequate legal protection for domestic workers in China. Civil law governs the legal relationship between domestic workers and homeowners or domestic service companies. This part introduces and compares these two streams of law, which then pave the way for the subsequent analysis of the legal relationships applicable to domestic workers in China.

⁹⁷ Wang, above n 93.

⁹⁸ The term labour relationship (劳动关系 in Chinese) rather than the term employment relationship (雇佣关系) is used in the current Chinese Labour Law. The term employment relationship was considered capitalist and exploitive, and was thus avoided in the Chinese legislation. (see Zengxian Yang “试论雇佣劳动与剥削的非必然关联” 2008(7) Social Science Forum (No Necessary Connection Between Employment Relationship and Exploitation), at 4) However, after the transition from the planned economy to a market-based economy, the difference of between these two relationships is basically wiped out. Despite there are arguments regarding the differences between employment relationship and labour relationship in China among researchers, (see Xiangkuan Shi 债法各论 (China University of Political Science and Law Press, Beijing, 2000) (The Law of Obligations), at 294; Xingquan Wang 劳动法 (Law Press China, Beijing, 2008) (Labour Law), at 127; Xueguo Wen “论雇佣合同” 1997(1) Science of Law (Employment Contract in China); Jianyu Xu “雇佣关系的定位及其法律调整模式” 2002 2 Journal of Zhejiang University (Humanities and Social Sciences) (The Attribution of Employment Relationship and Its Legal Regulatory Mode)) a labour relationship is also considered to be the same as an employment relationship in international research. (see Ronald C Brown *Understanding labor and employment law in China* (Cambridge University Press, 2009), at 21). To avoid confusion, the term employment relationship is used as a synonym for labour relationship in this thesis. Similarly, the Chinese labour laws have not used the word “employee”, instead, the word “labourer (劳动者)” is used. To avoid confusion, the word “employee”, instead of the word “labourer”, is used to refer to those workers who have established a labour relation with their employers.

The Chinese labour protection law system covers the protection of human resources and social security in China. Labour Law,⁹⁹ which was promulgated on the fifth of July in 1994, is at the core of the labour protection law system in China. This law is the first basic comprehensive law that was developed to protect the legal rights of workers and to regulate labour relationships following the foundation of the People's Republic of China in 1949.¹⁰⁰ Labour Law is concerned with the promotion of employment, labour relationship, collective contract, work and rest hours, vacations, wages, hygiene and safety of the workplace, protection of female and minor workers, occupational training, social insurance, welfare, labour disputes, and labour inspection. Following the initial promulgation of the Labour Law, China issued a series of affiliated legislation, such as the Chinese Labour Contract Law,¹⁰¹ the Social Insurance Law,¹⁰² the Employment Promotion Law,¹⁰³ the Law on Labour Dispute Mediation and Arbitration,¹⁰⁴ the Work Safety Law¹⁰⁵ and a series of affiliated regulations to complement the labour law system.¹⁰⁶ The Chinese Labour Law, together with these affiliated laws and regulations, form the labour protection law system in China.

Civil law in China is a general term for all legal norms that adjust property relationships and personal relationships between civil subjects with equal status.¹⁰⁷ The General Principles of

⁹⁹ The Labour Law of the PRC(中华人民共和国劳动法), 05 July 1994, entered into force 01 January 1995.

¹⁰⁰ Huai Guan “六十年来我国劳动法的发展与展望” 2009(12) Law Science Magazine (Analysis about the Sixty-Year Development and Relative Prospect of Chinese Labour Law), 关怀, at 3-4.

¹⁰¹ Labour Contract Law of the PRC (中华人民共和国劳动合同法), 29 June 2007, entered into force 01 January 2008.

¹⁰² The Social Insurance Law of the PRC (中华人民共和国社会保险法), 28 October 2010, entered into force 01 July 2011.

¹⁰³ Employment Promotion Law of the PRC (中华人民共和国就业促进法), 30 August 2007, entered into force 01 January 2008.

¹⁰⁴ Law on Labour Dispute Mediation and Arbitration of the PRC(中华人民共和国劳动争议调解仲裁法), 29 December 2007, entered into force 01 May 2008.

¹⁰⁵ Work Safety Law of the PRC (中华人民共和国安全生产法), 29 June 2002, amended 31 August 2014, entered into force 01 December 2014.

¹⁰⁶ Guan, above n 100.

¹⁰⁷ Zhenying Wei 民法(Peking University Press, Beijing, 2013) (The Civil Law).

the Civil Law set key concepts relating to, inter alia, Contract Law,¹⁰⁸ Consumers Protection Law,¹⁰⁹ Liability Law,¹¹⁰ Marriage Law,¹¹¹ Inheritance Law,¹¹² Adoption Law¹¹³ as well as affiliated regulations, which stipulate specific rules of the civil law.¹¹⁴

There are differences between the legal relationships regulated by these two branches of law. This thesis compares a work contract¹¹⁵ in civil law with an employment contract in labour law. Both types of contract involve the exchange of labour and payment, but correspond to different types of legal relationships.

Firstly, while labour law adjusts the unequal power inherent to the legal relationship between employing units and employees,¹¹⁶ civil law regulates the legal relationship between subjects deemed to be of equal status. Only employing units can form employment relationships with workers in China. These include organisations such as enterprises, self-employed economic organisations and private non-enterprise units as well as state organs, institutions and public organisations.¹¹⁷ Natural persons are not qualified employing units and cannot therefore establish an employment relationship. However, there is no such limitation on the establishment of a work contract as the subject of a work contract can be a natural person, legal person or other legally registered organisation.

¹⁰⁸ Contract Law of the PRC (中华人民共和国合同法), 15 March 1999, entered into force 01 October 1999.

¹⁰⁹ Law on Protection of Consumer Rights and Interests of the PRC (中华人民共和国消费者权益保护法), 31 October 1993; amended 27 August 2009 and 25 October 2013, entered into force 15 March 2014.

¹¹⁰ Tort Liability Law of the PRC (中华人民共和国侵权责任), 26 December 2009, entered into force 01 July 2010.

¹¹¹ The Marriage Law of the PRC (中华人民共和国婚姻法), 10 September 1980, amended 28 April 2001.

¹¹² Law of Succession of the PRC (中华人民共和国继承法), 10 April 1985, entered into force 01 October 1985.

¹¹³ Adoption Law of the PRC (中华人民共和国收养法), 29 December 1991, amended 04 November 1998, entered into force 01 April 1999.

¹¹⁴ Huixing Liang 民法总论 (3rd ed, Law Press China, Beijing, 2007) (An Overview of the Civil Law of China).

¹¹⁵ A "work contract" is a contract whereby the contractor, in accordance with the requirements of the client, completes a job and delivers its results, and the client pays the remuneration.

¹¹⁶ Labour Contract Law of the PRC, above n 101, article 2.

¹¹⁷ Labour Law of the PRC, above n 99, article 2.

Secondly, while a labour contract involves a relationship of subordination, a work contract does not. Employees need to comply with their employing units' rules and regulations and follow their employing units' organisation, management, and work arrangement. In contrast, the contractor in a work contract is not subordinate to the client. The client pays for the service or the product provided by the contractor, but does not interfere with the contractor's process of production or service.

Thirdly, while employing units provide a means of production to their employees, clients in a work contract do not provide a means of production to a contractor. Contractors are responsible for the provision of their services or the production of their product. Therefore, contractors are responsible for providing their own means of production unless an additional agreement has been reached between the client and the contractor.

Fourthly, while a labour contract must be concluded in written form, a work contract can be concluded in either written or oral form. Labour Law provides that a written labour contract is concluded when a labour relationship is established.¹¹⁸ However, it does not mean that a written document is the only proof of an established labour relationship. The determination of the establishment of a labour relationship is evaluated on the basis of the actual relationship between the parties.

Fifthly, employing units must pay "each according to his/her contribution" and "equal pay for equal work".¹¹⁹ The wage must also be compliant with the minimum wage. In contrast, a client in a work contract only needs to pay the remuneration in accordance with their agreement with the contractor.

Finally, employing units in a labour relationship have different legal responsibilities from clients in a work contract relationship. Labour law emphasises the protection of employees. Employing units have to provide legal protection for their employees and bear the legal

¹¹⁸ Labour Law of the PRC, above n 99, article 10.

¹¹⁹ Labour Law of the PRC, above n 99, article 46.

responsibilities arising from their employees' on-duty behaviour. By contrast, civil law emphasises the freedom of contract. The client and the contractor can decide their rights and obligations through good faith negotiation. Contractors are responsible for their own actions.

	Employment contract	Work contract
Subject	Between employing units and natural persons	No limitation
Relationship of Subordination	There is a relationship of subordination between employees and employing units.	Parties have equal status, no relationship of subordination.
Form of contract	Written	Written or oral
Payment	The principle of "To each according to his contribution", "Equal pay for equal work". Not lower than the minimum wage.	Equivalent exchange
Provision of means of production	Employing units have the responsibility of providing means of production	Workers are responsible for the means of production unless both sides agree on another arrangement.
Legal responsibilities	Employing units have to provide legal protection for their employees in accordance with	No legal protection is involved. Workers are responsible for own actions.

	Chinese labour protection law, and bear the legal responsibility of their employees' on-duty actions.	
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(Chart of differences between labour contract and work contract)

Relationships regulated by the labour protection law or civil law result in different legal entitlements for workers. This next section analyses domestic workers' legal relationships with homeowners and with domestic service companies. It explains why domestic workers cannot obtain adequate legal protection in their legal relationships.

3 Legal relationships concerning domestic workers and their lack of access to labour protection

The legal relationships between Domestic workers, homeowners and domestic service companies is contingent to their legal entitlements. Domestic workers cannot obtain employee status from their legal relationships with homeowners and with domestic service companies. However, having employee status is the precondition for obtaining labour protection in China. Domestic workers in China thus do not have access to labour protection.

(a) Legal relationships of domestic workers

As mentioned above, according to the Chinese law, an employment relationship can only be established between workers and employing units. Therefore, the employment relationship cannot be established between domestic workers and homeowners because households are not employing units. Consequently, the legislation between domestic workers and homeowners in China is that of a service relationship, or more specifically, a labour service relationship.

The legislation in China does not provide a definition of a labour service relationship. Broadly speaking, a labour service relationship is an economic relationship established between two civil subjects with equal status during the exchange of labour service and remuneration.¹²⁰ In other words, labour service relationships cover all economic relationships that involve an exchange of labour and remuneration, except for employment relationships. Homeowners are clients of domestic workers, and domestic workers are service providers. The civil law thus regulates the legal rights and obligations of the parties to a domestic service contract.

The legal relationship between domestic workers and domestic service companies is also not an employment relationship, but an intermediary relationship. In this relationship, domestic service companies are brokers, who help domestic workers or homeowners to find suitable households or individuals.¹²¹ An intermediary contract is a contract whereby the broker presents to the client an opportunity for entering into a contract, or provides the client with intermediary services which facilitate the conclusion of a contract, and the client pays the remuneration.¹²²

(b) Domestic workers' lack of access to labour protection

Domestic workers cannot obtain labour protection from homeowners. Homeowners are not employers but clients of domestic workers. Homeowners thus do not have an obligation to provide legal protection to domestic workers.

Moreover, domestic workers cannot obtain labour protection from domestic service companies. Domestic service companies are not their employers but brokers, whose legal duty is to facilitate the establishment of a contract between two parties.¹²³ Domestic service companies thus are not responsible for providing labour protections to domestic workers.

¹²⁰ Demin Yang “论劳动关系与劳务关系” 2005 23(7) Hebei Law Sciences (Research on Labour Relationship and Labour Service Relationship), at 141-142.

¹²¹ Li, above n 70, at 135.

¹²² Contract Law of the PRC, above n 108, article 424.

¹²³ Ibid, article 426.

Domestic service companies also do not have the responsibility to assist domestic workers in obtaining sufficient legal protection from homeowners. Domestic service companies' main legal obligation, as brokers, is to provide valid information to their clients. They thus do not interfere with the duties and obligations of domestic workers towards homeowners, even if the low bargaining power of domestic workers has resulted in an unfavourable agreement for domestic workers.

In addition, the Ministry of Labour reiterates that labour protection law does not apply to domestic workers.¹²⁴ Such a regulation eliminates the possibility for domestic workers to obtain labour protection as non-employees. Moreover, the exclusion of domestic workers from participation in labour disputes arbitration illustrates that China does not allow domestic workers to obtain even part of the legal entitlements that are based on the employment relationship. The Ministry of Labour and Social Security pointed out that labour disputes arbitration does not apply to workers who provide part-time labour to households or individuals on 30 May 2003.¹²⁵ Similarly, the Supreme People's Court interpreted that labour arbitration does not cover domestic workers' disputes with households or individuals on 10 July 2006.¹²⁶ Consequently, domestic workers in China do not have access to labour protection.

D Conclusion

This chapter firstly compares the definition of the domestic worker adopted by the ILO Domestic Worker Convention and the definition as it is applied in China. The comparison reveals that the definition adopted by Chinese regulations is too broad to be used to analyse

¹²⁴ Opinions on the Enforcement of the Labour Law of PRC (关于贯彻执行〈中华人民共和国劳动法〉若干问题的意见), Ministry of Labour of the PRC, 4 August 1995.

¹²⁵ Opinions on Problems Regarding Non-full-time Employment(关于非全日制用工若干问题的意见), Ministry of Human Resources and Social Security of the PRC, 30 May 2003, available at http://www.gov.cn/gongbao/content/2003/content_62263.htm.

¹²⁶ Interpretation of Several Issues Concerning the Application of Law in the Trial of Labour Dispute Cases II (关于审理劳动争议案件适用法律若干问题的解释(二)), The Supreme Court of PRC, 10 July 2006.

the precarious status of domestic workers. The chapter then clarifies the definition of the domestic worker used in this thesis does not include workers who fall within the scope of the labour protection law in China. Including these workers to the definition of domestic workers would not improve the legal protection of these workers but could result in overlap between labour protection law and specific law for domestic workers. Moreover, this chapter defines domestic workers as people who are engaged in domestic work under the instruction and supervision of households. Such a definition distinguishes domestic workers from independent contractors.

Moreover, the chapter introduces the demographic characteristics of domestic workers in China. It explains the connection between demographic characteristics of domestic workers and their disadvantaged status in China. The last section of the chapter introduces the Chinese legal system and the legal status of domestic workers in the Chinese system. The introduction of the Chinese legal system provides a legal context for the analysis of the legislative precariousness of workers in Chapters Three and Four, and the recommendations for addressing their legislative precariousness in Chapter Five.

III Chapter 3 precarious workers in China

The previous chapter addressed the legal status of domestic workers in China, providing a legal background for analysing the legal and regulatory reasons that contribute to the disadvantaged status of domestic workers. In order to provide a comprehensive analysis of their status, this chapter adopts the concept of precarious work. It answers the question of who are precarious workers in China and why domestic workers are typically precarious workers. In particular, the chapter introduces the context of the emergence of precarious workers and uses Nicola Kountouris's legal determinants of precariousness¹ to analyse legal and regulatory reasons that contribute to the precarious status of workers in China.

The first section of this chapter introduces the concept of precarious work and provides a social background to the emergence of precarious workers in China. It reveals the connection between the emergence of precarious workers and the gradual transformation of China's economic model from a planned economy to a market-based economy after the 1970s. It firstly introduces the transformation of the relationship between employing units and employees, the approach of establishing an employment relationship and the social status of ordinary workers. Then it explains the connection between these changes and the emergence of precarious workers.

The second section of this chapter uses Kountouris' legal determinants of precariousness as the framework to reveal factors that contribute to the precarious status of workers. Kountouris' determinants provide a suitable legal conceptual framework for the analysis of the concept of precariousness in work relations in China. In particular, these determinants include immigration status precariousness, employment status precariousness, temporal precariousness, income precariousness, and organisational control precariousness.²

1 Nicola Kountouris "Legal Determinants of Precariousness in Personal Work Relations: A European Perspective, The" 2012 34 Comp. Lab. L. & Pol'y J.

2 At 27-35.

A The emergence of precarious workers in China

Precarious work is generally considered to be a part of the neoliberal revolution, which is triggered by the economic, political, and social pressure generated by rapid globalisation, technological advances – especially in information and communication technologies – and international competition and mobility in the product, capital, and labour markets since the 1970s.³ Extensive economic liberalisation policies such as privatisation, fiscal austerity, deregulation, free trade, and reductions in government spending in order to enhance the role of the private sector in the economy have been implemented under the influence of the neoliberal revolution.⁴

As a result, of the neoliberal revolution, increasingly flexible production processes and employment systems have been introduced by states and businesses, typified by greater use of precarious work.⁵ The use of precarious work has expanded through the whole world, due to the globalisation of production.⁶ The prevalence of precarious work affects not only the lives of workers, but also of society as a whole.⁷ The prevalence of precarious work has caused social unrest and tension between different social groups.⁸

There is no universal definition of precarious work due to its relation to economic, cultural, historical, and social factors.⁹ Precariousness generally relates to uncertain and unpredictable employment, income insecurity, poor working conditions, high workload, a lack of social

³ Arne L Kalleberg and Kevin Hewison “Precarious Work and the Challenge for Asia” 2013 57(3) *American Behavioral Scientist* 2711, at 274.

⁴ A Haroon Akram-Lodhi *What's in a Name? Neo-conservative Ideology, Neo-liberalism and Globalization* (Springer, 2006).

⁵ Arne L Kalleberg “Precarious work, insecure workers: Employment relations in transition” 2009 74(1) *American sociological review*.

⁶ *Ibid*, at 16.

⁷ Guy Standing “The Precariat-The new dangerous class” 2014 6(6-7) *Amalgam*.

⁸ *Ibid*, at 25.

⁹ Kalleberg and Hewison, above n 3.

protection and limited prospects for improvement.¹⁰ It is usually associated with factors such as age, gender, family circumstances, social or ethnic background, and psychological conditions.¹¹

Precariousness is also determined by comparing different factors in employment with others who are in the same social context.¹² From the perspective of employment status, self-employed workers are generally more precarious than standard wage earners.¹³ From the perspective of the hours of employment, temporary or part-time workers are generally more precarious than permanent or full-time workers.¹⁴ And from the perspective of demographic characteristics, migrant workers or ethnic minorities are generally more precarious than local workers and ethnic majorities.¹⁵ Such a comparison can be extended if more factors are considered.

Chinese society has gone through a transformation from a planned economy to a socialist market economy with the introduction of a series of economic reforms since the implementation of the Reform and Opening-up Policy in 1978.¹⁶ These economic reforms were implemented to change the stagnant and ineffective economy mode and to improve the efficiency of allocation of resources.¹⁷ As a result, the planned economy, where the state controls all economic activities and only public-owned enterprises are allowed, was replaced

¹⁰ Shaun Wilson and Norbert Ebert “Precarious work: Economic, sociological and political perspectives” 2013 24(3) *The Economic and Labour Relations Review*, at 266; Michael Quinlan “The ‘pre-invention’ of precarious employment: the changing world of work in context” 2012 23(4) *The Economic and Labour Relations Review*.

¹¹ Kountouris, above n 1, at 26.

¹² Leah F Vosko *Precarious employment: Understanding labour market insecurity in Canada* (McGill-Queen's Press-MQUP, 2006).

¹³ Quinlan, above n 10, at 4.

¹⁴ Arne L Kalleberg, Barbara F Reskin and Ken Hudson “Bad jobs in America: Standard and nonstandard employment relations and job quality in the United States” 2000 *American Sociological Review*, at 256-278.

¹⁵ Wilson and Ebert, above n 10, at 275.

¹⁶ Yongxiu Bai and Zhenlei Wu “中国 30 年经济改革与转型的政治经济学分析” 2008 38(1) *Journal of Northwest University (Philosophy and Social Sciences Edition)* (A Political Economic Analysis of the Economic Reform and Transition in the Recent 30 Years), at 6.

¹⁷ *Ibid.*

by the market-based economy where economic activities are not directly controlled by the state and are open to private enterprise and foreign enterprise.¹⁸

The employment relationship was also changed to accommodate the market-based economy. Flexible employment relationships replaced the standard unified employment relationship.¹⁹ These new-formed flexible employment relationships optimised the allocation of the labour force and thus have promoted the development of the economy.²⁰ However, although the overall living standard of citizens has increased to a large extent after these economic reforms,²¹ the economic reform also has contributed to the emergence of precarious workers in China.²² In particular, three key factors contribute to the emergence of precarious workers in China. These factors are the change of relationship between employees and employers, the shift in the method of establishing employment relationships and the degrading of the social status of the ordinary worker.

1 The change of relationship between employing units and employees

The relationship between employing units and employees was changed from a relationship of administrative subordination to an employment relationship.²³ This transformation causes the differentiation of the interests between employing units and workers, which is the fundamental economic reason for the emergence of precarious workers.²⁴

¹⁸ Ibid.

¹⁹ Wenzhong Tao “在经济社会发展中实现劳动者权益——中国劳动关系发展 30 年回顾” 2009 2(256) Modern Communication (The Improvement of Labour Protection for Workers along with the Economic and Social Development: a Review of the Development of Labour Relationship in China in the Recent 30 Years), at 30.

²⁰ Yifu Lin, Fang Cai and Zhou Li “论中国经济改革的渐进式道路” 1993(9) Economic Research Journal (Study on the Gradual Economic Reform in China), at 5.

²¹ Yuchang Xu “中国经济改革 30 年: 历程, 成就与问题” 2008 30(6) Journal of Yanan University (Social Science) (Chinese Economic Reform in the Recent 30 Years: Experience, Achievement and Problems), at 7.

²² Yong Liu “改革开放以来工人群众利益关系的变化及其调整” 2012 41(6) Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition) (Change and Adjustment of the Group Interest of Workers after the Reform and Opening-up in China), at 78.

²³ Tao, above n 19, at 48.

²⁴ Liu, above n 22, at 78.

The interest of workers was consistent with the interest of enterprises in the planned economy period.²⁵ In the planned economy, enterprises were basic economic units that were responsible for the implementation of government orders.²⁶ They did not have their own economic interests and did not have the right to run their business independently.²⁷ Instead of making their own production plans, their production was conducted in line with the state's plan.²⁸ The employing units' duty was finishing the production tasks that were assigned by the government.²⁹

Similarly, workers essentially worked for the state rather than for companies.³⁰ Under the planned system, all workers were recruited by the state, and they were then assigned to enterprises.³¹ Although the labour relationship was established between workers and enterprises, all obligations and rights between workers and enterprises, such as wages and other benefits, and working hours and holidays, were regulated by unified regulations from the state.³² In this system, all enterprises were publicly owned, and all workers were state employed.³³ The labour relationship was thus essentially established between the state and

²⁵ Jingbo Fan “我国政府应对劳资冲突的法律机制研究——劳动监察的介入定位与制度创新” 2012(1) Jiangsu Social Sciences (Research on Labour Dispute Resolution Mechanism in China: the Function of Labour Inspection and Mechanism Reform), at 109.

²⁶ Lingyun Zhao “转轨与摩擦 1979-1991 年中国二元经济体制格局的历史分析” 2006 3 Researches in Chinese Economic History (Transition and Friction: a Historical Review of the Dualistic Urban-rural Structure in China from 1979 to 1991), at 4.

²⁷ Xin Xiang and Shaozhi Su “1957-1978 年中国计划经济体制下的非计划经济因素” 2002 4 China Economic History.

²⁸ Baijia Zhang and Dan Zhu “中国经济体制两次转型的历史比较” 2009 7 Journal of Chinese Communist Party History Studies (A Historical Comparison between the Two Transformation of Economic System in China), at 10.

²⁹ At 10.

³⁰ Fan, above n 25, at 109.

³¹ Jun Guo “从政府和市场关系看中国劳动关系制度的演变” 2015(3) Studies on Mao Zedong and Deng Xiaoping Theories (Review of the Evolution of Labour Relationships in China from the Perspective of the Relationship between Government and Market).

³² Jie Ma and Bingwen Zheng “计划经济条件下新中国社会保障制度的再评价” 2005 1 Studies on Marxism (Review of the Social Protection System in the Planned Economy Period in China), at 44.

³³ Min Mu and Mingqing Yang “中国计划经济体制的选择与历史评价” 2001(1) Trade Unions's Tribune (A Historical Review of the Planned Economic System in China), at 58.

workers, and enterprises were just intermediaries to implement such a relationship. Therefore, the essential relationship between enterprises and workers was not an employment relationship, but a subordinate administration relationship.

After the economic reforms, the subordinate administration relationship between employing unit and employees in the planned economy period was replaced by a genuine employment relationship.³⁴ Since the market-based economy replaced the planned economy,³⁵ the government has withdrawn from direct management of enterprises; the market has replaced the government plan as the primary mechanism to decide the production of enterprises.³⁶ The state is no longer responsible for recruiting workers for enterprises, and the employment relationship is formed directly between enterprises and workers.³⁷

Under the new system, the employees' interests are no longer consistent with the employing units' interests.³⁸ State-owned enterprises, along with private enterprises, are granted the right to arrange production in accordance with the demands of the market.³⁹ Moreover, to promote the enthusiasm for production, state-owned enterprises are given the right to enjoy their profits.⁴⁰ As a result, the main objective of enterprises is not working for the state, but maximising their profits.⁴¹ To maximise the profit, employing units need to cut down costs and increase efficiency as much as possible. Consequently, the employing units' objectives conflict with the employees' demand for high wages and good protection standards. This conflict also exists in relation to the labour protection of workers. While high labour protection

³⁴ Tao, above n 19, at 30.

³⁵ Xu, above n 21, at 6.

³⁶ Zhang and Zhu, above n 28, at 21.

³⁷ Fan, above n 25, at 105.

³⁸ Bing Zhou “中国转型期经济改革理论的发展” 2004(2) Nankai Journal (Philosophy, Literature and Social Science Edition) (The Development of Economic Reform Theories in the Transition Period of China), at 39.

³⁹ Rongrong Li “宏大的工程 宝贵的经验——记国有企业改革发展 30 年” 2008(16) Qiushi (Great Project and Valueable Experience: a Record the Reform of State-owned Companies in the recent 30 years), at 27.

⁴⁰ At 30.

⁴¹ Qingsong Guo “三方博弈中的中国劳动关系——改革开放以来中国劳动关系的进展及问题研究” 2009(9) Academic Monthly (On Chinese Labour Relations in the Trilateral Game: A Study of the Progress and Problems of the Labour Relations since China's Reform and Opening-up), at 74.

standards increase the costs and decrease the profits of employing units, high labour protection standards can increase the safety level of the employees' workplace. As a result of these conflicts, employers start to reduce operational costs by dismissing workers and lowering labour protection standards.⁴²

2 The change of the employment channel and the way of providing wages and labour protection

The process for workers to be employed and to obtain wages and labour protection was changed following the economic reforms.⁴³ As the administration-oriented labour relationship in the planned economy period was replaced by a market-oriented labour relationship, the state is no longer responsible for allocating workers to companies and setting workers' wages and labour protection standards.⁴⁴ The employees now need to find employment opportunities by themselves. They also need to negotiate their wages and labour protection with employing units.⁴⁵ These changes have paved the way for the emergence of precarious workers.

The labour relationship in the planned economy was a state-planned life-long permanent relationship.⁴⁶ The Chinese Communist Party has claimed that one of the superior features of a socialist state is that the state does not have to deal with the problem of unemployment.⁴⁷ To solve the problem of unemployment, China used a centralised labour allocation mechanism to ensure the employment of all workers.⁴⁸ After all privately-owned entities were

⁴² Sujian Huang “国有企业改革三十年: 成就, 问题与趋势” 2008(6) Journal of Capital University of Economics and Business (Reform of Chinese State-owned Enterprises in the Recent 30 Years: Achievements, Problems, and Trend), at 9.

⁴³ Ma and Zheng, above n 3232 .

⁴⁴ Guo, above n 41, at 35.

⁴⁵ Tao, above n 19, at 30.

⁴⁶ Qiuhe Zeng and others “社会转型背景下同工不同酬问题探讨” 2011(27) China Market (Unequal Pay for the Same Job in the Period of Social Transition in China), at 110.

⁴⁷ Baoqin Lin “如何看待社会主义市场经济体制下的失业问题” 1997 4 Journal of Teachers College of Shanxi University (Philosophy, Social Sciences Edition) (Opinions on the Unemployment in the Socialist Market Economy), at 40.

⁴⁸ Ibid.

transformed into public-owned entities in 1957, the state council issued the order that forbade employing units from recruiting workers directly and centralised the right to recruit workers in the hands of the labour authorities.⁴⁹ After that, a centralised labour allocation mechanism was established. Under this mechanism, the state took over the employment and allocation of all workers. The state recruited all workers and then sent them to enterprises by government order.⁵⁰ Generally, once workers had been allocated, they were life-long permanent workers; they also could not change their job.⁵¹ In other words, a worker would work in the same position until retirement, unless another government order was issued to change the worker's position. In this system, all employing units were publicly owned, and all workers were permanent employees in public-owned units.

Following the economic transition, the government stopped interfering in the employment arrangements between enterprises and employees.⁵² Enterprises were given the right to choose their employees and workers were allowed to change job.⁵³ The method of establishing an employment relationship did not through government orders anymore, but by agreement between employing units and employees. Along with the change in the method of establishing employment relationships, the standards of wages and social insurance and employees' working pattern were also changed to accommodate the market-based economy.

Firstly, the unified standards for employees' entitlements, such as wages and social insurance, were no longer provided by the state. Instead, a labour contract was used to decide employees'

⁴⁹ Notice on Preventing Farmers from Blindly Flowing into Cities(关于防止农民盲目流入城市的通知), State Council Bulletin No. 42(1957), of the PRC, 14 September 1957, available at: <http://www.gov.cn/gongbao/shuju/1957/gwyb195742.pdf>; Interim Provisions of the State Council on the Recruiting Temporary Workers from Rural Areas(国务院关于各单位从农村中招用临时工的暂行规定), the State Council of the PRC, 13 December 1957.

⁵⁰ Angang Hu and Yonghong Cheng “中国就业制度演变” 2003(51) Review of Economic Research (The Evolution of the Employment in China).

⁵¹ Shaomin He “浅议社会主义市场经济条件下的失业” 1994(4) Economic Outlook Round the Bohai Sea (Unemployment in the Socialist Market Economy), at 18.

⁵² Tao, above n 19, at 37.

⁵³ Ibid.

entitlements. In the planned economy, the state provided comprehensive social protection for workers through their employing unit.⁵⁴ The social protection covered almost all aspects of life, although the standards of that protection were not high.⁵⁵ After the reform, the responsibility for providing social protection was transferred from the state to the enterprises. Many employees were dismissed because their employing units could not afford the cost of their social protection and many enterprises went into bankruptcy.⁵⁶ The loss of status as an employee of a state-owned enterprises led to discontinuation of the workers' social protection. Although new social insurance plans were designed to give dismissed workers social protection, both the number of people covered and the entitlements of the new social insurance plans were narrower than the social protection in the planned economy period.⁵⁷

Secondly, the change in the method of regulating labour relations also led to the emergence of new forms of employment. Following the economic reforms, in addition to full-time employees who still worked eight hours a day, many other types of flexible employment began to be commonly used by employers.⁵⁸ These flexible employment forms have become an indispensable part of the Chinese labour market.⁵⁹ The rapid development of flexible employment has created many job opportunities and thus relieved the unemployment pressure.⁶⁰ However, these types of employment are relatively new to the Chinese labour market, and the relevant legislation in labour management, wage payment, and social

⁵⁴ Haijun Cheng “计划经济时期中国社会福利制度的历史考察” 2008 5 *Contemporary China History Studies* (A Historical Investigation of the Social Welfare System in China During the Planned Economy Period), at 51.

⁵⁵ *Ibid*, at 50.

⁵⁶ Angang Hu and Yonghong Cheng “从计划体制转向市场机制: 对中国就业政策的评估 (1949—2001 年)(上)” 2012 5 *China Study* (From a Planned Economy to a Market-based Economy: the Evaluation of the Employment Policy in China from 1949 to 2001 (Part 1)).

⁵⁷ Liu, above n 22, at 79-80.

⁵⁸ Shengyong Chen and Qiuhe Zeng “国有企业“双轨制”用工制度改革: 目标与策略” 2012 1 *Academics in China* (Reform of the "Double Track Employment System" in State-owned Companies: Goal and Strategy), at 6.

⁵⁹ *Ibid*, at 7.

⁶⁰ Liu Qingtang “新中国 60 年劳动就业的成就与展望” 2009 3(3) *Journal of Beijing Vocational College of Labour and Social Security* (Achievements and Prospect Regarding Employment and Labour Protection in China in the Recent 60 Years), at 5.

protection has not been well established.⁶¹ In addition, most of the employees in flexible employment situations are low-skilled manual workers who lack the awareness and ability to safeguard their rights.⁶² As a result, employees in flexible employment do not have equal labour protection with standard employees and they have become vulnerable to infringements.

3 The degrading of ordinary workers' social status

The economic reforms have also resulted in a decline in the social status of ordinary workers. After the reforms, workers lost the sense of being the owners of their enterprises.⁶³ Such a change in people's mindset served as an ideological basis for the emergence of the precarious worker.

Under the old regime, the Chinese government was established on the theory of the dictatorship of the proletariat.⁶⁴ According to this theory, the means of production is state-owned, and the proletariat is the owner of the state. Thus, the proletariat is considered to be the owner of the enterprises.⁶⁵ As the leader class of the state, the proletariats' high social status was strongly emphasised by propaganda and was ensured by providing relatively equal wages and other allowances to both cadres and ordinary workers.⁶⁶ Therefore, the idea that

⁶¹ Jianfei Li “社会变革中的中国劳动合同法立法” 2009 6 *The Jurist* (Development of the Chinese Labor Contract Law in the Period of Social Reformation).

⁶² Yanling Lin “中国工人权利意识的发育状况及其原因分析” 2010(2) *Journal of China Institute of Industrial Relations* (The Development of Awareness of Rights among Workers in China), at 73.

⁶³ Qihong An and others “当前企业职工主人翁意识状况调查与分析” 1991(s2) *East China Economic Managemen* (Survey and Analysis on the Sense of Being the Owner of the Company among Employees).

⁶⁴ Shoujuan Qiu “毛泽东人民民主专政理论新探” 2002 18(2) *Journal of PLA Nanjing Institute of Politics* (Inquiries into the Theory of Mao Zedong's People's Democratic Dictatorship), at 54.

⁶⁵ *Ibid.*

⁶⁶ Aiyun Wang “试析新中国成立后我国身份社会的形成及其影响” 2011 12 *Journal of Chinese Communist Party History Studies* (A Tentative Analysis of the Formation of the Status-based Society in Our Country after the Founding of New China and Its Influence), at 59.

the proletariat is the owner of the state and its enterprises was deeply rooted among the people in the planned economy period.⁶⁷

After the reform, along with privatisation of state-owned enterprises and the emergence of private and foreign companies, common workers lost the feeling of being the owner of the state.⁶⁸ Theoretically, the nature of China's socialist state has not changed, and the proletariat is still the owner of the state; however, this socialist character can hardly be reflected in private companies as the proletariat is only considered as the employees instead of the owners.⁶⁹ Moreover, the lack of labour protection for ordinary workers, especially for those working in private enterprises, lead to the elimination of the concept of "workers as the owner".⁷⁰ Such a change of worker's mindset has aggravated their sense of precariousness.

Since 1978, a series of economic reforms have been introduced to increase the efficiency of the development. While the reforms have achieved success in economic development and improvement of the living standard of citizens, precarious workers have also been created as many social norms have also changed. Employing units' interests are no longer consistent with employees' interests as employing units start to pursue maximum profits. The unified wage and labour protection standards, which used to be decided by the government, are replaced by standards that are decided by individual companies. Ordinary workers' social status has started to decline as they are no longer considered to be the owners of the state.

B Legal determinants of precariousness in China

⁶⁷ An and others, above n 63.

⁶⁸ Jixing Liu "当前我国工人基本状况的分析与思考" 1991(1) Sociological Studies (Analysis of Workers' Basic Working Conditions in China), at 88.

⁶⁹ Ibid.

⁷⁰ Chenming Shen "改革开放以来我国劳动关系发展的问题及对策" 2015(17) Economic Research Guide (The Problems and Countermeasures of the Development of Labor Relations in China since the Reform and Opening), at 55.

While workers have been becoming increasingly precarious since the social and economic reforms in the 1970s, the research on the precarious status of workers in China is inadequate. The majority of research in China on the disadvantaged workers uses the distinction between formal and informal employment as a standard to evaluate if a worker has a disadvantaged status.

Employment status is widely used to identify disadvantaged workers in research on labour protection in China because a significant number of workers in China are still excluded from labour protections. As outlined in the section above, China has gone through a radical social and economic transition in the last 40 years. The establishment of employment relationships is no longer directly controlled by the state since the economic transition; however, the legislation has not caught up with the transition in the labour market.⁷¹ Consequently, many workers in the private sector are left unregulated by the labour protection law.⁷² Therefore, formal and informal employment, which are distinguished by the establishment of an employment relationship, is still widely used as a standard to identify the disadvantaged workers in research on vulnerable workers in China.

While the distinction between formal and informal workers reveals workers' exclusion from labour protection, it cannot reveal factors that affect workers' working conditions, such as inadequate labour protection law, inadequate trade union protection, and workers' disadvantaged social identities. Moreover, the distinction between formal and informal work is often unable to capture the complexities of contemporary employment practice as designed to (a) reduce costs, (b) limit or reduce the permanent workforce, (c) maximise employers' flexibility, and (d) shift employment risks to workers.⁷³

⁷¹ Kuang Tang and Hong Tan “中国劳动法治建设的动力渊源与发展趋向研究” 2015 36(7) Dong Yue Tribune (The Motivation and the Trend of the Development of the Labour Law in China).

⁷² Linlin Hou “劳动合同的特殊性研究” 2006(1) Legal Science (Characteristics of a Labour Contract), at 107-108.

⁷³ Kalleberg and Hewison, above n 3, at 273.

Therefore, although there is a close connection between the lack of employment status and the vulnerable status of workers, it does not mean that having an employment status protects workers from precarious status. As argued by Kountouris, standard work cannot be used as the benchmark for developing legal protection for informal work when the standard work is also becoming precarious.⁷⁴ The last section introduces the point that employment status does not thus guarantee job security, stable income or comprehensive social protection of workers. Limiting the research to the distinction between formal and informal employment may thus lead to employees' low job stability or low-level wages and social protection being ignored. Using the concept of precarious work to analyse the working conditions of workers answers such an inadequacy because the concept of precarious work evaluates their actual vulnerabilities. It thus not only captures vulnerabilities arising from their lack of employment status, but also the imperfect legislation or the poor enforcement of the legislation.

However, using the concept of precarious work to analyse the vulnerable status of workers has its weakness, namely the lack of a clear standard to evaluate the workers' precariousness. As mentioned above, the concept of precarious work considers not only workers' objective factors but also their subjective factors. Therefore, the standard to define precarious work may vary between countries or even between individuals. The variety of determinants can lead to the complexity in applying such a concept. To offset the complexity in using such a concept, this thesis uses Kountouris's legal determinants of precariousness, which include immigration status precariousness, employment status precariousness, temporal precariousness, income precariousness, and organisational control precariousness,⁷⁵ as a framework to analyse the legal and regulatory factors that contribute to the precarious status of workers in China. This framework avoids the insufficiency of using employment status to differentiate between precarious workers and secure workers. Moreover, Kountouris's legal determinants of precariousness conform to the focus of this section, which is analysing the legal and regulatory factors that contribute to the precarious status of workers in China.

⁷⁴ Kountouris, above n 1, at 25.

⁷⁵ Ibid, at 27.

1 Immigration status precariousness

Immigration status relates to the undeclared and inherently precarious work relationship which may cause such workers to be marginalised in the labour market.⁷⁶ It is a crucial factor for workers' job security.⁷⁷ In China, most migrant workers are internal migrant workers from rural or underdeveloped areas.⁷⁸ The vast rural-urban and regional development disparity creates an incentive for people to move to the cities, especially the big cities, for a higher income and better standard of living.⁷⁹ Big cities such as Beijing, Shanghai, Shenzhen and provincial capitals generally have more and better employment opportunities and higher wages than small cities and rural areas.⁸⁰ Big cities thus attract a large number of migrant workers from rural areas and small cities.

Unlike many developed countries where internal migrant workers are not treated any differently from locals with regard to access to public services and other social welfare, internal migrant workers in China do not have equal access to these benefits as do local workers.⁸¹ The Chinese Household Registration System (HRS), which is used to decide the distribution of social welfare among Chinese citizens, is the main regulatory reason for these differences between internal migrant workers and local workers.

⁷⁶ Wilson and Ebert, above n 10.

⁷⁷ Kountouris, above n 1, at 27.

⁷⁸ Jianlin Niu and others “城市外来务工人员的工作和居住环境及其健康效应” 2011 35(3) *Population Research* (Working and Living Environments of Migrant Workers and its Impact on their Health Condition--Evidence from Shenzhen), at 67.

⁷⁹ Yaoyang Zheng “户籍制度对新生代农民工市民化的影响及对策分析” (PhD Thesis, Jilin University 2014) (Household Registration System's Influence on the Urbanisation of the New-generation Migrant Workers in China)24.

⁸⁰ Keqiang Wang, Jungang He and Hongmei Liu “户籍堤坝效应与东部城市就业吸引力研究” 2014 6 *Chinese Journal of Population Science* (Research on Dam Effect of the Household Registration and Employment Attraction of Cities in Eastern China), at 5.

⁸¹ Hong Feng and Guihong Yang “户籍制度与农民工就业歧视辨析” 2013(2) *Population and Economics* (On the Analysis of the Household Registration System and Discrimination in Employment of Migrant Workers), at 87.

(a) Household Registration System (HRS)

HRS is a national population administration system in China.⁸² It is used by the Chinese government to administer society regarding issues such as public security and the distribution of public services.⁸³ A person's original household registration address is determined by their father's or mother's household registration address. Such a registered address can only be changed when another city accepts their application for a change of household registration address.⁸⁴

People's household registration addresses affect many of their rights, such as political rights, medical care, education, and public housing.⁸⁵ In other words, if someone's household registration is not in the city s/he is living in, s/he is unable to receive all, or even a part of, the social benefits that are enjoyed by locals. Although such a system has served to maintain the stability of the society and to avoid overpopulation of cities, especially big cities,⁸⁶ such a system has expanded the gap in economic development between migrant workers and local workers; it has also deprived citizens of their freedom of movement.⁸⁷

China has acknowledged the serious negative influence of household registration on society, especially on social justice.⁸⁸ Therefore, along with the economic reform in the 1970s, China has been reforming its household registration system. Previously, the state strictly controlled migration between rural and urban areas in the planned economy period; the household

⁸² Meiyan Wang and Fang Cai “户籍制度改革的历程与展望” 2008 6 Social Sciences Guangdong (The History and the Prospect of the Household Registration System Reform), at 20.

⁸³ Ibid.

⁸⁴ Article 10 of the Regulation on Household Registration of the PRC (中华人民共和国户口登记条例), 9 January 1958, entered into force 9 January 1958.

⁸⁵ Yilong Lu 超越户口-解读中国户口制度 (China Social Science Press, Beijing, 2004) (Analysis on Chinese Household Registration System), at 14.

⁸⁶ Zheng, above n 79, at 15.

⁸⁷ Ibid.

⁸⁸ Baobin Ma and Ping Du “从公平到公正:转型期民众社会正义认知重心的变迁路径研究” 2018 19(1) The Journal of Shanghai Administration Institute (From Fairness to Justice: The Change of the People's Cognitive Emphasis of Social Justice in China), at 290-300.

registration system was used to serve such a purpose.⁸⁹ Following China's transition from a planned economy to a socialist market economy, China lifted the restriction on migration between regions and between rural and urban areas.⁹⁰ However, although the restriction has been lifted, household registration still affects people's ability to relocate to other places because of the connections between the address of a person's household registration and the place where the person can enjoy social benefits. For example, the close connection between a citizen's available schools for compulsory education and the address of the household registration means that, if a couple moves to another city, their children may be unable to obtain good quality and affordable compulsory education, which are available only to local householders.

In 2016, the Provisional Regulation of Residence Permit⁹¹ was promulgated by the State Council as a measure to achieve the government's long-term reform target of giving equal treatment to all citizens. While the residence permit was introduced to enable internal migrant workers to enjoy more social benefits and to reduce the differences in rights between locals and internal migrants,⁹² the residence permit has not eliminated unequal treatment between local and migrant workers. Obtaining a residence permit requires fewer documents and procedures than changing the address of household registration, and a residence permit gives migrant workers access to a part of the public services, such as applying for a new identity

⁸⁹ Gang Yuan "户籍的性质, 历史与我国户籍制度改革" 2008(5) Tribune of Study (Nature, History and Reform of the Chinese Household Registration system).

⁹⁰ Zheng, above n 79, at 16.

⁹¹ The Provisional Regulation of Residence Permit (居住证暂行条例)(China), 21 October 2015, entered into force on 1 January 2016, available at http://www.gov.cn/zhengce/content/2015-12/12/content_10398.htm.

⁹² According to Article 12 of the Provisional Regulation of Residence Permit, a holder of a residence permit has the rights of employment, to access social insurance, and to pay and use the housing fund. County and higher level governments provide the following basic public services: 1. compulsory education; 2. basic public employment services; 3. basic public health and family planning services; 4. public cultural and physical services; 5. legal aid and other legal services; and 6. other basic services provided by the state.

According to Article 13, a holder of a residence permit can have the following privileges in their place of residence: 1. international immigration documents services; 2. renewal and replacement of national ID; 3. motor vehicle registration; 4. application for a driving licence; 5. application for professional examinations and application for professional qualifications; 6. family planning registration and services for other family planning documents; and 7. other privileges provided by the state.

card or applying for a driving license. However, a residence permit does not give migrant workers equal treatment with locals in terms of key social benefits, such as access to education, public housing and social insurance. For example, in Beijing, holders of a residence permit do not have equal access to compulsory education and equal opportunity to sit the University Entrance Examination as holders of Beijing household registration have.⁹³

(b) Influence of the HRS on the employment of workers

As mentioned above, household registration of workers is linked with their access to social benefits. In terms of the work-related precariousness of migrant workers, lack of local household registration contributes to their receiving lower wages than local workers who are doing the same work.⁹⁴ It also leads to fewer job opportunities for migrant workers than those of local workers, because some employers prefer workers who have local household registration over migrant workers.⁹⁵

In general, internal migrant workers receive a lower wage than local workers.⁹⁶ Although personal factors, such as poor educational background and insufficient vocational skills, contribute to their low wages, lack of local household registration is also a factor.⁹⁷ Firstly, the reduced opportunities for migrant workers to obtain a job in publicly-owned companies

⁹³ The Policy on School Entrance Examination of Children of Migrant Workers in Beijing (进城务工人员随迁子女接受义务教育后在京参加升学考试工作方案)(China), jointly issued by the Beijing Municipal Commission of Education, Beijing Municipal Public Security Bureau, Beijing Municipal Development and Reform Commission, Beijing Municipal Human Resources and Social Security Bureau, 05 January 2013, available at http://www.gov.cn/zwgk/2013-01/05/content_2305015.htm.

⁹⁴ Yuanhai Wan and Shi Li “户籍歧视对城乡收入差距的影响” 2013(9) *Economic Research Journal* (The Effects of Household Registration System Discrimination on Urban-rural Income Inequality in China).

⁹⁵ Zhiyong Zhang “户籍制度: 农民工就业歧视形成之根源” 2005 4 *Agricultural Economy* (The Household Registration System: a Source of Discrimination Against Migrant Worker in China).

⁹⁶ Wan and Li, above n 94; Ling Yu, Haifeng Zhang and Xianguo Yao “户籍地影响农民工工资吗?——基于杭州市外来农民工问卷调查的实证研究” 2017 228(12) *Collected Essays on Finance and Economics* (Does the Household Registration Affects the Wage of Migrant Workers?--Evidence from Hangzhou), at 10.

⁹⁷ Wan and Li, above n 94.

contribute to the low average wage of these workers.⁹⁸ The average wage in public companies, whether owned and operated by the national government or by the local government, is substantially higher than the average wage in private companies. Taking Beijing as an example, the average annual wage of employees in public enterprises is 131,700 yuan, while the average annual wage in private companies is 70,738 yuan.⁹⁹ Although the reform of the HRS in recent years has reduced the importance of household registration with respect to job opportunities, household registration is still connected to job opportunities and the establishment of a formal employment relationship between workers and public companies.¹⁰⁰ Consequently, migrant workers may be unable to obtain a job in public companies even though they may have the same personal requirements, such as educational background and professional skills, as local workers.¹⁰¹

Household registration is also detrimental to workers' opportunity to be employed by private companies. The Employment Promotion Law stipulates that workers shall not be subject to discrimination.¹⁰² It also stipulates that rural migrant workers enjoy equal rights to work as urban workers do, and employers shall not set restrictions that are discriminating against migrant workers.¹⁰³ However, there are still employing units who set limitations or use other excuses to decline job applications from workers who do not have a local household registration.¹⁰⁴ A key reason for employing units' preference for local workers is the stability

⁹⁸ Jingfang Sun "城市劳动力市场中户籍歧视的变化:农民工的就业与工资" 2017(08) Economic Research (The Household Registration Based Discrimination in the Chinese Labour Market: Employment and Wages of Migrant Workers from Rural Areas), at 184.

⁹⁹ Explanation Concerning the Average Wage of Employees in Beijing in 2017 (解读 2017 年北京市就业人员平均工资), Beijing Bureau of Statistics, 25 May 2018, available at the official website of Beijing Municipal Bureau of Statistics: http://www.bjstats.gov.cn/bwtt/201805/t20180525_398481.html.

¹⁰⁰ Sun, above n 98, at 184.

¹⁰¹ Ibid.

¹⁰² Article 3 of Employment Promotion Law of PRC (中华人民共和国就业促进法), 30 August 2007, entered into force 01 January 2008.

¹⁰³ Ibid, article 31.

¹⁰⁴ Shijun Zhou and Qin Zhou "户籍制度, 非农就业“双重门槛”与城乡户籍工资不平等——基于 CHNS 微观数据的实证研究" 2012(9) Journal of Financial Research (The Connection between the Disparity of Wages and the Household Registration: an Empirical Study Based on CHNS Microcosmic Data).

resulting from having a local household registration. As mentioned above, household registration is connected to the enjoyment of social benefits. The possibility for migrant workers to leave the city where they are currently living is higher than for local workers due to their limited access to social protection.¹⁰⁵

For the same reason, even though migrant workers can have the same job opportunities as local workers, they are less likely to establish a formal and stable relationship with their employing units. The low percentage of signing written labour contract among internal migrant workers reflects their informal and unstable relationship with their employing units. Although the signing of the written labour contract, as will be explained in the section on employment status precariousness, does not necessarily lead to a secure and stable relationship between workers and employing units, the absence of such a contract implies that the relationship between the workers and the employing unit is unstable and temporary.¹⁰⁶ According to the Report and Survey of Migrant Workers from Rural Areas, only 35.1 per cent of migrant workers from rural areas have signed a written labour contract with their employers.¹⁰⁷ While subjective factors of migrant workers affect the percentage negatively, such as the preference for a flexible job that enables them to come back to their hometown freely, the employers' preference for local workers is the main reason why such a low percentage of migrant workers have signed a written labour contract with their employers.¹⁰⁸

¹⁰⁵ Jintian Chen “打破户籍制度“瓶颈”是有效促进我国农村劳动力转移的必由之路” 2009(6) Journal of Qiqihar University (Philosophy, Social and Science Edition) (To Break Bottleneck of the Household Registration is the Only Way to Promote Workforce Migration from Rural Areas to Urban Areas in China).

¹⁰⁶ See the next section.

¹⁰⁷ Report of Rural Migrant Workers in China 2016(2016 年全国农民工监测调查报告), National Bureau of Statistics, 28 April 2017, available at: http://www.stats.gov.cn/tjsj/zxfb/201704/t20170428_1489334.html.

¹⁰⁸ Fanqiang Meng and Jiang Wu “我国劳动力市场劳动合同签订的影响因素与户籍差异” 2013(1) Industrial Economic Review (Factors that Affect the Conclusion of Labour Contract in China), at 134; Zhanxin Zhang and Huili Hou “两类外来人口的劳动合同签订与社会保险获得差异” 2008 2 China Opening Herald (Study of Differences between Two Types of Migrant Workers Regarding Conclusion of Labour Contract and Access to Social Insurance).

(c) Influence of the HRS on the employment of domestic workers

As outlined in Chapter Two, most domestic workers in the city are internal migrant workers from underdeveloped or rural areas.¹⁰⁹ Such a demographic characteristic means that the job of the majority of domestic workers is precarious due to their internal migrant worker identity. Moreover, the intimate relationship between domestic workers and homeowners means that the negative influence on a domestic worker of lacking a local household registration is even more serious than its influence on ordinary workers. Consequently, homeowners are usually willing to pay local domestic workers a higher wage than the wage they willing to pay migrant workers, or they even choose only local domestic workers.¹¹⁰

The lack of local household registration affects the wage and job opportunities for domestic workers negatively. Domestic work usually involves a close and intimate relationship between households and domestic workers. In particular, in cases of live-in domestic workers, the service provided by these workers is connected directly to the standard of living of the homeowners. In order to find a domestic worker who meets their requirements with respect to personal preferences, such as food and hygiene, they may use the location of the household registration to evaluate domestic workers.¹¹¹ In addition, lack of local household registration may affect the consistency of services provided by migrant workers. Domestic service is connected to the daily life of homeowners, so any unscheduled interruption or termination of the provision of the domestic service may affect the life of homeowners directly. Homeowners thus prefer domestic workers who can provide consistent service. The connection between

¹⁰⁹ See chapter 2.

¹¹⁰ Liang Zhang and Anqi Xu “家政从业人员的权益保障及社会支持-以上海家政服务为例” 2011 2011(2) Journal of Social Sciences (The Legal Protection and Social Support for Domestic Workers--Take the Domestic Service in Shanghai as An Example), at 84-86; Lin Zhang and Yi Yang “家政女工体面劳动赤字的社会排斥分析--基于武汉市的调查” 2014(12) Hubei Social Sciences (An Analysis of Domestic Workers' Social Exclusion: Based on a Survey in Wuhan city), at 55.

¹¹¹ Yongkui Luan, Shengnan Huang and Zhigang Wang “家政服务人员的从业现状, 存在问题及解决对策研究——基于北京和河北的调查分析” 2012(06S) China Collective Economy (Research on Employment Situation of Domestic workers and Solutions for Problems Facing Domestic Workers: Based on a Survey of Domestic Workers in Beijing and Hebei Province), at 158.

household registration and public services such as the qualification of obtaining compulsory education contribute to the difficulty for migrant workers to bring their family members, especially their children, with them to the place where they work. Consequently, migrant domestic workers may need to go back to their hometown frequently to deal with family affairs or to reunite with family members on national holidays.

By contrast, local domestic workers do not bring such concerns. Local domestic workers usually live in the same place as their family members, so they do not frequent time away. They are thus more likely to provide consistent domestic services than migrant domestic workers do.

2 *Employment status precariousness*

Employment status in China is the most radical legal determinant of precariousness. As Kountouris said, “in its extreme manifestations” of employment status precariousness, workers are disenfranchised “from any protection afforded by labour [or employment] law”.¹¹² In China, having employment status is the pre-requisite for obtaining the legal protection afforded by the labour protection law.¹¹³ Workers who do not have any employment status in China thus face such an “extreme manifestation” of employment status. Furthermore, the lack of employment status prevents workers from obtaining social benefits, such as the opportunity to change their household registration and access to buying social insurance plans in the place where they work.

¹¹² Kountouris, above n 1.

¹¹³ According to Article 3 and 7 of the Labour Law of the PRC, labour rights in China include employees’ rights (1) to be employed on an equal basis and to choose occupations; (2) to obtain remuneration for their labour, (3) to take rest, have holidays and leave; (4) to obtain protection in aspects of occupational safety and health; (5) to receive training in vocational skills; (6) to enjoy social insurance and welfare; (7) to submit applications for settlement of labour disputes, and (8) to participate in and organize trade unions, in accordance with the law and the labour rights in China, which also gives employees access to other rights that are stipulated by law.

Although workers' lack of employment status can be a result of their personal choice, such as their preference for flexible employment arrangements,¹¹⁴ the absence of a written labour contract and disguised an employment relationship are two key factors that contribute to the employment status of workers in China.

(a) The lack of a written labour contract contributes to the precariousness of workers' employment status

A written labour contract is the main evidence of an employment relationship.¹¹⁵ Although it is not the only proof of the establishment of a labour relationship, it is difficult for a worker to prove the establishment of an employment relationship if they have not signed a written labour contract with their employer.¹¹⁶ Consequently, the lack of a written labour contract contributes to the difficulty for workers to obtain labour protections. In addition, a labour contract is required to contain clauses for such items as wages, working days, working hours, and social insurance, which is important for the protection of employees.¹¹⁷ Without a written labour contract to confirm the scope of these rights and the standard of legal protection, employees may be unable to realise all legal rights they can enjoy in an employment relationship. Working without a written labour contract thus increases the opportunity for employing units to escape the legal responsibilities of being an employer.

However, in spite of the importance of signing a written labour contract with employers, a significant proportion of workers in China have not signed it. According to a report from Ministry of Human Resources and Social Security of the People's Republic of China

¹¹⁴ Xuejing Lv “灵活就业形式对女性就业的影响及对策” 2005(4) *Population&Economics* (Influence of Flexible Employment on the Employment of Female Workers), at 34; 代际差异视角下平台型灵活就业者的就业选择研究; Xiaoyu Li and Qin He “代际差异视角下平台型灵活就业者的就业选择研究” 2018 32(4) *Journal of China University of Labor Relations* (A Study of the Employment Choices of Platform-based Flexible Employment Workers from the Perspective of Intergenerational Differences).

¹¹⁵ Hou, above n 72.

¹¹⁶ Fang Hong “劳动合同、劳动用工之于劳动关系建立的意义” 2011 26(7) *Social Science Review* (The Labour Contract, de facto Employment and the Establishment of a Labour Relationship).

¹¹⁷ Labour Contract Law of the PRC (《中华人民共和国劳动合同法》), 29 June 2007, entered into force 01 January 2008, article 17.

(MOHRSS), the percentage of signed written labour contracts among workers in enterprises above a designated size¹¹⁸ in China was higher than 90 per cent in 2013.¹¹⁹ There were 772,530,000 employees in China.¹²⁰ It means that there are still more than 70 million employees who have not signed a labour contract with their employers.

Furthermore, the percentage of workers who have not signed a written labour contract in small and medium size companies is significantly lower than the percentage in the abovementioned large size companies. Therefore, the number of employees overall who have not established a written labour contract with their employers is much higher than the official number implies. For example, in Liu and Zhou's survey in Hangzhou city, the rate of signed labour contracts among migrant workers is 40.6 per cent¹²¹ and in Wu's survey of 1795 young workers in ten cities in China, the rate of young workers who have signed a labour contract is 62.1 per cent.¹²²

The situation is even more acute in employment relations when an individual economic organisation is an employer: the rate of workers who have signed a labour contract with their employer is zero per cent in Yu and Wang's survey of employees of individual economic organisations in Dongguan city.¹²³ Although factors, such as the limited focus on a single group of employees, affect the accuracy of data in these unofficial surveys, there is good

¹¹⁸ The statistical terminology "enterprise above designated size (规模以上企业)" are companies whose annual income of its main business is higher than 20 million yuan. Available at: http://www.stats.gov.cn/tjgz/tjdt/201103/t20110308_17520.html.

¹¹⁹ Communique of Human Resources and Social Security Development in 2014 (2014 年度人力资源和社会保障事业发展统计公报), Ministry of Human Resources and Social Security of the PRC, 28 May 2015, available at: http://www.mohrss.gov.cn/SYrlzyhshbzb/dongtaixinwen/buneyiaowen/201505/t20150528_162040.htm

¹²⁰ National Bureau of Statistical and Ministry of Human Resources and Social Security *China Labour Statistical Yearbook 2014* (China Statistics Press, Beijing, 2014).

¹²¹ Hui Liu and Huiwen Zhou "农民工劳动合同低签订率问题的实证研究" 2007 21(3) *Journal of China Institute of Industrial Relations* (An Empirical Research on Low Rate of Signing Labour Contract among Migrant Workers).

¹²² Weidong Wu "青年就业者劳动合同签订状况及意愿调查" 2015(2) *Contemporary Youth Research* (A Survey the Status and Willingness of Young Workers to Sign Labour Contract), at 107.

¹²³ Yuji Quan and Jianwen Wang "《劳动合同法》实施后东莞个体工商户劳动用工规范化探析" 2010 17(4) *Journal of Dongguan University of Technology* (A Study on the Standardisation of the Employment in Small Businesses in Dongguan City after the Implementation of the Labour Contract Law).

evidence that the rate of signed labour contract among workers, especially informal workers, is much lower than the rate reflected in the official document.

(b) Employing units disguise their employment relationships with workers as commercial relationships

Employing units' acts of disguising employment relationships as commercial relationships contribute to the precarious employment status of workers. The phenomenon of disguising employees as independent contractors or service providers is widespread in the Chinese labour market.¹²⁴ As mentioned above, employment status is connected to the labour protection of workers. Therefore, establishing an employment relationship with a worker leads to employing units' responsibility to provide legal protection to the worker and to pay the main share of the social insurance premium for the worker. Undertaking these responsibilities increases the employing units' operation costs significantly. In order to avoid these responsibilities, employing units often use commercial relationships to disguise their employment relationships with their workers. Consequently, a large number of de facto employees work under the label of self-employed or service providers.¹²⁵

Employing units' concealment of the employment relationship leads to the precarious employment status of those workers. In particular when workers do not know what their legal entitlements are, workers may be deceived into believing that they are not employees of the company, so they are not entitled to enjoy the legal protection afforded by the labour protection law. Even when workers realise that employing units are violating the law, and they are entitled to labour protection, a disguised employment relationship can lead to a higher cost for employees to safeguard their legal rights, as they need to prove the establishment of

¹²⁴ Baohua Dong ““隐蔽雇佣关系”研究” 2011 28(5) *Studies in Law and Business* (Study on "Disguised Employment Relationship").

¹²⁵ Juan Nie and Chaohai Li ““散工”群体的生存状态与社会治理-以广州的实地调查为例” 2014(12) *Academic Research* (The Standard of Living of Temporary Workers and the Regulation on These Workers in Guangzhou City).

a labour relationship before they can claim their legal rights.¹²⁶ As a result, workers may still be unable to obtain labour protection due to their lack of financial resources and time to safeguard their rights.

(c) Precarious employment status of domestic workers

The employment status of domestic workers is even more concerning than other precarious workers in China. As introduced in Chapter Two, the definition of domestic workers in the thesis does not include workers who have established an employment relationship with domestic service companies. Therefore, they are not protected by the labour protection law in China. Moreover, even if these workers have established *de facto* labour relationship with domestic service companies, they may still be excluded from labour protections due to the fact that domestic service companies frequently disguise employment relationships as commercial relationships. Moreover, the legal limitations on becoming qualified employing units and the legal limitations on the age of employees also contribute to domestic workers' lack of employee identity.

Firstly, domestic service companies' habit of disguising their employment relationships with service workers contributes to the precarious employment status of those workers. As explained in Chapter Two, the legal relationship between domestic workers and domestic service companies is an intermediary relationship.¹²⁷ The domestic service company is only a broker who helps domestic workers to find suitable homeowners. However, the relationship between domestic workers and domestic service companies in practice is not as simple as their legal relationship in theory. While domestic service companies only sign an intermediary contract with domestic workers, they may perform some management activities, such as requiring domestic workers to wear a uniform that shows the company's logo and complying with the rules of the company on domestic workers. Some intermediary domestic service

¹²⁶ Suhua Liu “论事实劳动关系的认定及其法律保护” 2007 22(2) Journal of Beijing Federation of Trade Unions Cadre College (Definition of and Legal Protection for *de facto* Labor Relationship in China), at 45.

¹²⁷ See chapter 2.

companies even pay monthly wages to domestic workers.¹²⁸ Although these activities may lead to the establishment of de facto employment between domestic workers and the domestic service company, domestic workers do not have any employment status because their actual employment relationship with the domestic service companies is disguised as an intermediary relationship.

Secondly, the limitations on the legal identity of employing units and the limitations on the age of employees contribute to the precariousness of their employment status. As introduced in Chapter Two, in order to establish a labour relationship, both the employing unit and the employee should be legally qualified. In particular, qualified employing units are registered entities including enterprises, individual economic organisations, private non-enterprise entities, state organs, public institutions, and social organisations.¹²⁹ Therefore, households or individuals are not classified as qualified employers. Consequently, domestic workers cannot legally establish an employment relationship with homeowners.

The legislation also limits the age of employees. Generally, the age of employees in China must be above 16 years and below the age of retirement, which is 50 or 55 for female workers and 60 for male workers.¹³⁰ However, as highlighted in Chapter One, domestic workers are generally older than workers in other sectors: in fact, a large proportion of female domestic workers in China are older than 50. These domestic workers thus, cannot establish an employment relationship with domestic service companies.

¹²⁸ Ma. Haiwei and others “家庭服务行业法律纠纷问题及其对策研究” 2012 3 Social Sciences Review (Research on Legal Disputes in the Domestic Service Industry and Solutions)104, at 60.

¹²⁹ Labour Contract Law of the PRC, above n 117, article 2.

¹³⁰ According to Chinese legislation, the retirement age for workers connects to their gender, position, and intensity of work. For example, while the retirement age for general female employees(女职工) is 50, the retirement age for female civil servants is 55. See the Interim Measures of the State Council on Workers' Retirement and Resignation (国务院关于工人退休、退职的暂行办法) (China), approved by the Standing Committee of the Fifth National People's Congress on 24 May 1978. Moreover, the retirement age for flexible employment workers is 55 for female workers and 60 for male workers. see the Notice on Issues Concerning the Improvement of the Basic Endowment Insurance Policy for Urban Employees (关于完善城镇职工基本养老保险政策有关问题的通知)(China), Ministry of Labour and Social Security, 22 December 2001, available at: http://www.mohrss.gov.cn/gkml/xxgk/201407/t20140717_136207.htm.

3 *Income precariousness*

Income precariousness is a legal determinant that touches the root of the problem of precarious work.¹³¹ As Kountouris has argued, “A person's working life can easily be affected by all other legal determinants of precariousness, but the availability of a steady and decent income can still allow that person to live a fulfilling and dignified existence.”¹³²

Wages are the primary source of income for most workers. Sufficient wages guarantee employees' basic living standards. Protecting workers' right to obtain wages has important implications in balancing the relationship between employing units and employees, promoting the normal functioning of the market and maintaining the stability of the society.¹³³ The incomes of a significant proportion of workers, especially poorly skilled workers, are precarious because they are neither stable nor sufficient.

(a) Illegal wage deductions and default contributes to the income precariousness of workers

Lack of effective legal and procedural guarantee on wage protection can result in income precariousness of workers.¹³⁴ The existence of illegal wage deductions and default reflects the ineffective legal protection on the wage of workers in China. Wages default is the situation when an employing unit does not pay wages on time, without a justified reason, after employees have provided the labour in accordance with the law and the labour contract.¹³⁵ Illegal wage deduction takes place when an employing unit deducts an amount from

¹³¹ Kountouris, above n 1.

¹³² Ibid.

¹³³ Zhijun Zhai 和谐社会的必然路径——体面工资的提出及其意义 (A Necessary Requirement to Develop a Harmonious Society--Proposition of Decent Wage and its Significance).

¹³⁴ Kountouris, above n 1.

¹³⁵ Supplementary Provisions on Issues Related to the Interim Provisions on Wages Payment (对《工资支付暂行规定》有关问题的补充规定), the Ministry of Labour of the PRC, 12 May 1995, available at: http://www.mohrss.gov.cn/gkml/zcfg/gfxwj/201407/t20140717_136244.html.

employees' wages without a justified reason after employees have provided the labour in accordance with the law and the contract.¹³⁶ Wage default and illegal wage deduction in practice include the following examples: (1) an employing unit deducts from or defaults on employees' wages when they are about to change their jobs; (2) a labour contractor in the construction industry deducts or defaults on employees' wages; (3) an employing unit makes regulations to deduct from employees' wages for the sake of cutting down on labour costs; (4) an employing unit deducts temporary workers' wages.¹³⁷

Although the Provisional Regulations on Payment of Wage and the Labour Law formally forbid wage default and limit the application of wage deduction,¹³⁸ unlawful wage deduction and default are common in the Chinese labour market due to poor enforcement of legislation, insufficient regulation, poor legal awareness of workers and lack of channels for workers assert their rights.¹³⁹ Unlawful wage deduction and default can lead to the instability and unpredictability of the income of workers. Workers may be unable to receive any income for several months or even a year due to illegal wage default.¹⁴⁰

¹³⁶ Ibid.

¹³⁷ Guijun Han *劳动者权益保护实务* (China Legal Publishing House, Beijing, 2013) (Practice of Labour Protection), at 96.

¹³⁸ The Provisional Regulation on the Payment of Wages(工资支付暂行规定)(China), the Ministry of Labour, 06 December 1994, entered into force 01 May 1994; the Labour Law of the PRC (中华人民共和国劳动法), 05 July 1994, entered into force 01 January 1995, article 50.

¹³⁹ Haiming Li “农民工欠薪问题的成因及其治理——以建筑业农民工工资拖欠及其法律救济为例” 2011 29(7) Hebei Law Science (Causes and Governance of the Wage Deduction and Default of Migrant Workers --a Case Study of Wage Deduction and Default of Migrant Workers in the Construction Industry); Fayuan Wang and Zhenkai Tu “农民工工资纠纷的原因及对策” 2005(4) Academic Exchange (Solutions for the Wage Disputes between Migrant Workers and Their Employers).

¹⁴⁰ See the second batch of typical cases of arrears of labour remuneration announced in 2018 published by the Ministry of Human Resources and Social Security, available at: http://www.gov.cn/fuwu/2018-06/04/content_5295977.htm.

(b) Being excluded from minimum wage protection leads to income precariousness

Kountouris mentions that the absence of the minimum wage is the most common example of income precariousness.¹⁴¹ In China, minimum wage protection, as a part of labour protection, only applies to workers who have official employment status. As mentioned in the employment status section, there is a significant number of workers in China, including domestic workers, who do not have any official employment status. The absence of the minimum wage contributes to their insufficient income to cover their most basic living expenses. Even though the monthly wages of these workers can be higher than the minimum wage, they may be paid at a lower hourly rate than the rate of the minimum wage due to the absence of minimum wage protection. Therefore, being excluded from the minimum wage protection contributes to the income precariousness of workers.

Firstly, being excluded from the protection of the minimum wage contributes to a wage that is not sufficient to cover the most basic expenses of themselves and their families. In China, local governments promulgate the minimum wage standard in accordance with the most basic expenses of workers and their dependent family members.¹⁴² Taking as an example the minimum wage in Shanghai, which had the highest minimum wage in China in 2018, its monthly minimum wage was 2,420 yuan and its average monthly wage was 7,832 yuan.¹⁴³ Globally, the minimum wage to the average wage ratio in most countries is somewhere between 45 and 60 per cent.¹⁴⁴ However, in China, there is not a province that has a minimum wage to the average wage ratio that is higher than 40 per cent.¹⁴⁵ For example, the ratio in

¹⁴¹ Kountouris, above n 1, at 32.

¹⁴² The Regulation on Minimum Wage (最低工资规定)(China), the Ministry of Labour and Social Security, 20 January 2004, entered into force 01 March 2004, article 1.

¹⁴³ The minimum wage of provinces in China can be found on the official website of the Ministry of Human Resource and Social Security of PRC. The average wage in Shanghai in 2018 can be found on the website of the Shanghai Municipal Human Resources and Social Security Bureau.

¹⁴⁴ International Labour Office *Global Wage Report 2016/17: Wage inequality in the workplace* (ILO, 2016), at 27

¹⁴⁵ Yong Xie and Liyan Wang “中国的最低工资标准:发展、构成和水平” 2015 No.181(6) Research on Development (The Development, Constitution and Level of the Minimum Wage in China), at 146.

Beijing is 27.51 per cent and the ratio in Shanghai is 30.89 per cent.¹⁴⁶ The low minimum wage to average wage ratio means that if a worker's wage is lower than the minimum wage, the worker can barely afford their most basic living expenses.

Secondly, workers may be underpaid by their employers due to being excluded from minimum wage protection. Although the monthly income of workers who are excluded from minimum wage protection may be higher than the minimum wage, the high income of these workers is usually a result of their long working hours.¹⁴⁷ While the monthly minimum wage is calculated on the basis of eight hours a day and five days a week, some workers may work 10 hours a day and six days a week, or even longer, but only obtain a wage that is slightly higher than the minimum wage. Consequently, their gross monthly income may be higher than the minimum wage level, but they may still be paid at a lower hourly rate.

(c) Output-related income arrangements contribute to the unstable income of workers

Output-related income arrangement means that all or part of one's income is determined in reference to the output or performance of the individual, or by the output or performance of the worker's employing unit.¹⁴⁸ While such a measure can promote the productivity of workers, it can also lead to the income precariousness of the workers, especially when the wage of the workers is determined solely on the performance or output of those workers.¹⁴⁹ It is unlikely that they will be able to receive sufficient income when they come across

¹⁴⁶ In Beijing, the minimum monthly wage in 2018 is 2120 yuan, while the average monthly wage is 7706 yuan.

¹⁴⁷ Yong Xie “最低工资制度在农民工就业中的落实情况及影响因素研究” 2010(3) *Economic Management* (The Implementation of Minimum Wage Regulation in Migrant Workers and Its Determinants: Evidence from Jiangsu Province).

¹⁴⁸ Kountouris, above n 1.

¹⁴⁹ Min Li, Guangxiang Gao and Jihong Liu “制衣小企业计件工资及其谈判特征” 2012(3) *Human Resources Development of China* (Wages of Workers in Small Cloth Manufacturing Companies and the Characteristics of Negotiation Between Workers and Employers); Ming Lu and Hui Lin “计件工资视域下劳动者两大权益的维护——基于浙江省制造业企业调查数据的分析与思考” 2017 23(3) *Shandong Trade Unions Tribune* (The Protection of Workers who Work under an Output Related Wage Arrangement: a Study Based on a Survey of Manufacturing Companies in Zhejiang Province).

unexpected situations, such as sickness of the worker, power cut of the company or bad weather.

The output-related income arrangement is widely used by companies in China. According to Lu and Lin's survey of manufacturing companies in Zhejiang province, the wages of 44.9 per cent of workers are determined solely on output, the wage of 36.8 per cent of workers is determined on both working hours and output, and only 17.2 per cent of workers' wages are determined entirely on working hours.¹⁵⁰ A similar result can be found in Li, Gao and Liu's survey on small cloth manufacturing companies, where the wages of more than 90 per cent of workers are output-related.¹⁵¹

When these workers have employee status, their basic wage is usually the minimum wage. As mentioned above, China has a low minimum wage level. Consequently, they may be unable to obtain a minimum wage which consists of a small proportion of their normal wages if their performance or output does not meet the employers' requirements. When these workers do not have an employment contract, the absence of the minimum wage further exacerbates their income precariousness. They may be unable to obtain an income that covers even the most basic living expenses of themselves and their family members when they have poor performance or low output.

(d) Income precariousness of domestic workers in China

Domestic workers in China suffer from income precariousness not only because of their lack of access to labour protections but also because their work takes place in private households and because of the chaotic regulation of domestic service companies. Being excluded from the labour protection law means that their income is vulnerable to illegal deduction and default, and their wage is not protected by the minimum wage. Thus, factors that contribute to the income precariousness of other workers also contribute to income precarious of domestic workers.

¹⁵⁰ Lu and Lin, above n 149, at 17.

¹⁵¹ Li, Gao and Liu, above n 149, at 82.

Moreover, working in private households, under the chaotic regulation of domestic service companies, exacerbates the income precariousness of domestic workers. Working in a private household, especially when domestic workers live with homeowners, gives these workers a false impression that they know their homeowner well. It is also easy for domestic workers to believe that the homeowners are unlikely to run away to avoid wages because of the immovable nature of the house.

However, even when domestic workers are in a private household, they might not even know the full name of the homeowners, not to mention information such as the workplace address, which could be used to file a lawsuit against the homeowners.¹⁵² The house could also be a rented property. Consequently, if the homeowner moves out of the house and cuts off contact, these domestic workers may be unable to provide any information about homeowners which could be used to recover their wage loss.

Furthermore, the poor regulation of domestic service companies also contributes to the income precariousness of domestic workers. Although intermediary domestic service companies are not responsible for paying wages to domestic workers, some companies receive service fees from households on behalf of domestic workers and settle accounts weekly or monthly with the domestic workers.¹⁵³ Consequently, although there is no employment relationship between domestic service companies and domestic workers, some domestic workers receive wages from domestic service companies. Domestic service companies thus have the opportunity to default or deduct the wage of the workers. As mentioned in Chapter One, a significant number of domestic service companies are not registered, due to the poor regulation of the domestic service industry. When these companies shut up shop, the workers may be unable to find the owner of the shop, and they may thus be unable to receive their wages.

¹⁵² Zhuo Chen “家政女工依法维权的经验研究——以 11 位在京从事家政服务的农村女性为例” (LLM Dissertation, China Youth University for Political Sciences, 2010) (Female Domestic Workers' Experience of Protecting Their Rights---an Empirical Research of 11 Migrant Domestic Workers in Beijing).

¹⁵³ Haiwei and others, above n 104, at 60.

4 *Temporal precariousness*

Temporal precariousness is one of the most common legal determinants of precariousness, which occurs as a consequence of temporary and uncertain work relations.¹⁵⁴ Although requirements have been stipulated to increase employees' job stability under Chinese labour protection law, a large group of workers is still in a precarious state. The inherently temporal work relation, lack of labour protections, and imperfect law to protect employees from unfair dismissal are three key factors that contribute to temporal precariousness of workers in China.

(a) Inherent temporality of jobs contributes to temporal precariousness

The temporal precariousness of a worker can result from the inherent temporality of a job, which can result from a fixed-term or seasonal employment contract or from an employment contract for a specific task.¹⁵⁵ In China, the employment of a large group of workers is inherently temporal. These workers are usually referred to as “day labourers (散工 in Chinese)” in academic research. There is no clear definition of the term “day labourer”.¹⁵⁶ They are usually migrant workers who work on short-term, temporary or odd jobs.¹⁵⁷ These workers engage in short-term work that usually lasts for a few days or a few weeks. The channel for them to obtain job opportunities is by gathering in specific places and waiting for

¹⁵⁴ Kountouris, above n 1.

¹⁵⁵ Ibid.

¹⁵⁶ Daming Zhou and Jianxin Zhou ““自由的都市边缘人”——东南沿海散工研究 (一)” 2006 27(8) Journal of Southwest Minzu University (Humanities and Social Science) (Marginalised Residents in Cities: a Study of Day Labourer in Southeast China (1)).

¹⁵⁷ Changkun Cai ““共建”: 社会网络变迁中的结构和理性——基于E 市建筑散工网络的研究” 2012 32(6) Society (“Co-Constitution”: Structure and Rationality in the Transformation of Social Networks: A Case Study of Casual Construction Workers' Social Networks in E City).

someone to call them.¹⁵⁸ They usually do manual jobs, such as construction or manufacturing work,¹⁵⁹ which do not require sophisticated occupational skills.¹⁶⁰

This large group can be found in most cities in China. Although there is no clear number of day labourers, the low percentage of signed written labour contracts among migrant workers implies that a large group of them are working as day labourers or in similar conditions. The inherent temporality of these workers' jobs contributes to their temporal precariousness.

(b) Lack of legal protection regarding job security contributes to temporal precariousness

Workers' jobs can be precarious when the working hours are not long enough to meet the threshold for legal protection on job security.¹⁶¹ In China, part-time work, when daily working hours are less than four hours and gross weekly working hours are less than 24 hours, can be precarious because the legislation on job security does not apply to these workers.¹⁶² Under this form of employment, either the employer or the employee in a part-time employment relationship can terminate the employment at any time.¹⁶³ Although such a form of employment meets the preference of some workers, such as college students, who do not need a full-time job, workers in such a form of employment are in a precarious position because their employers can terminate the employment at will.

¹⁵⁸ Biao Xiang *跨越边界的社区* (SDX Joint Publishing Company, 2000) (Transcending Boundaries).

¹⁵⁹ Daming Zhou and Jianxin Zhou ““自由的都市边缘人”——东南沿海散工研究（二）” 2006 29(9) Journal of Southwest Minzu University (Humanities and Social Science) (Marginalised Residents in Cities: a Study of Day Labourer in Southeast China (2)).

¹⁶⁰ Li Xu “城市外来“散工”社区就业与社会支持——以武汉市为例” 2009 29(1) Journal of South-Central University for Nationalities (Humanities and Social Science) (Community Employment and Social Support for Day Labourer: Taking Wuhan as an Example).

¹⁶¹ Kountouris, above n 1.

¹⁶² Article 68 of the Labour Contract Law of the PRC stipulates that non-full-time employment is a form of employment under which remuneration is mainly calculated by the hour and the workers generally work for not more than 4 hours per day in average and not more than an aggregate of 24 hours per week for the same employing unit.

¹⁶³ Article 71 of the Labour Contract Law of the PRC Either of the two parties to part-time employment may give a notice to the other party at any time to terminate the employment, and in such a case the employing unit shall not pay any financial compensation.

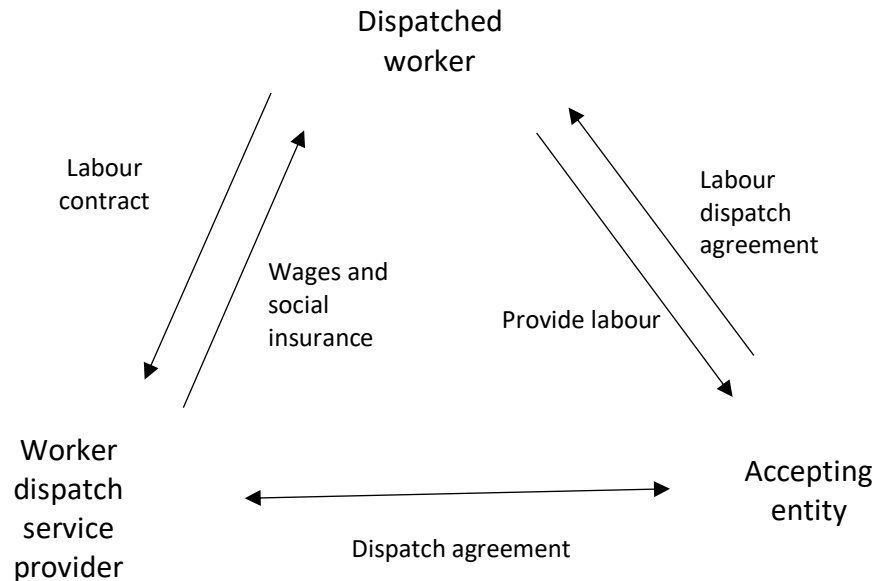
(c) Insufficient restraint on the employing units' ability to terminate employment contributes to temporal precariousness

A worker may still fall into a precarious situation when they have a full-time and open-ended employment contract with their employers if the legislation does not protect them from unfair dismissal.¹⁶⁴ In China, in addition to workers who do not have access to labour protections, such as the abovementioned day labourers and part-time workers, workers who work under a labour dispatch arrangement can be in a precarious position because they are vulnerable to unfair dismissal in practice.

Dispatched workers are workers who are seconded to other companies (accepting entities) after they have established a labour relationship with a labour service company. In this triangular relationship, dispatched workers are the employees of the labour service company and do not have a labour relationship with the company that uses their labour.¹⁶⁵ The diagrammed hereunder explains visually the relationship between the various entities in a triangular relationship.

¹⁶⁴ Kountouris, above n 1

¹⁶⁵ Article 58 and 59 of the Labour Contract Law.



As a flexible type of employment, worker dispatch service was introduced to China in the 1980s.¹⁶⁶ Since then, it has been commonly used by the government to tackle unemployment¹⁶⁷ and by companies to reduce labour costs.¹⁶⁸ The prevalence of using dispatched workers to replace employees has generated unequal treatment between dispatched workers and regular employees, thus increasing job instability.¹⁶⁹ According to a survey conducted by the All-China Federation of Trade Unions, dispatched workers constitute 13.1

¹⁶⁶ Manqin Tan “劳务派遣适用范围的规范检视与规制路径再思考” 2015(2) *Journal of China Institute of Industrial Relations* (Review of the Scope of Application of the Dispatched Labour and Reflection of a New Path of Regulating the Dispatched Labour), at 18.

¹⁶⁷ Rongfang Zhang 被派遣劳动者的劳动权利保护研究 (Whuhan University Press, 2008) (Research on Labour Protection of Dispatched Workers), at 25.

¹⁶⁸ Xiong Li “我国劳务派遣制度改革的误区与矫正” 2014 1(03) *The Jurists* (Mistakes in the Reform of the Labour Dispatch System in China and the Correction of These Mistakes), at 39.

¹⁶⁹ Xiumin Lu and Ying Chen “我国劳务派遣现实困境及对策研究” 2013(6) *Journal of Political Science and Law* (Studies on the Practical Predicament of Labor Dispatch in China and Its Countermeasures), at 12.

per cent of all employees in China.¹⁷⁰ The rate is even higher in some state-owned enterprises. For example, dispatched workers account for 71.2 per cent of all workers in China Mobile.¹⁷¹

Under such an arrangement, in theory, the dispatched workers work under a stable employment relationship as the labour service company has to establish a labour relationship with the worker and the employment relationship has to be longer than two years.¹⁷² However, in practice, these workers are in a precarious position because their work in the company that receives their labour is usually temporary. More importantly, unlike employers in a regular employment relationship, the accepting entity can terminate their relationship with the dispatched workers, not only in accordance with the labour law, but also in accordance with their agreement with labour dispatching companies.¹⁷³ Consequently, companies can use dispatched workers to circumvent the restriction on termination of employment stipulated in the labour protection law.

When workers are sent back to the labour dispatching companies, although the workers are still employees of the labour dispatching company, they can only obtain minimum wage, which is substantially lower than the wage they would have obtained when they were dispatched to the other companies. Consequently, although they do not theoretically lose their employment status, the substantial wage decrease gives them a similar effect to having been dismissed by their employers. In other words, even though these workers have a stable employment relationship with the labour dispatching company, they are still in a precarious

¹⁷⁰ National Research Group on Dispatched Labour “当前我国劳务派遣用工现状调查” 2012(5) China Labour (Survey of the Dispatched Labour in China).

¹⁷¹ Ibid.

¹⁷² Article 5 of the Interim Provisions on Labour Dispatch stipulates that a labour dispatch entity shall enter into written labour contracts with the dispatched workers for a fixed term of two years or more in accordance with law. Interim Provisions on Labour Dispatch (劳务派遣暂行规定), the Ministry of Human Resources and Social Security of the PRC, 24 January 2014, entered into force 01 March 2014.

¹⁷³ Yijun Liu “完善我国劳务派遣退回机制的思考” 2014(5) China Labor (Opinions on the Improvement of the "Return Mechanism" in Dispatched Labour); Manqing Tan “对新规背景下劳务派遣退回条件的思考” 2015(2x) China Labor (Reflection on the Returning Conditions of Labor Dispatch under the Background of the New Regulations), at 50.

position because the companies that receive the dispatched workers could terminate the labour dispatch relationship at will.

(d) Temporal precariousness of domestic workers

Domestic workers in China suffer temporal precariousness because of the inherent temporality of domestic work and their lack of legal protection or job security. Firstly, domestic work itself is temporary. Although there are live-in domestic workers who work for a single household for years, most domestic workers are hired to perform specific tasks or to fill a gap where help is lacking.¹⁷⁴ For example, domestic workers are usually hired to look after women in their confinement period or to look after children or the elderly when they are sick or injured.¹⁷⁵

Secondly, the lack of protection on job security contributes to their temporal precariousness. As mentioned in Chapter Two, the contract between domestic workers and households is a service contract. Households are service receivers and domestic workers are service providers. The working period is mutually agreed between households and domestic workers. The legislation on job security thus does not apply to the relationship between domestic workers and homeowners. Moreover, as mentioned in the section of the employment status precariousness, a large proportion of domestic workers have not even signed a written contract with homeowners, let alone signing additional agreement on job security. It means that when homeowners terminate the contract unilaterally, they may even do not need to pay financial compensation to domestic workers.

5 Organisational control

¹⁷⁴ Xiaojuan Wu “温州家政服务业的调查与思考” 2004 26(4) Journal of the Party School of CPC Ningbo Municipal Committee (Survey on the Domestic Service Industry in Wenzhou); Fangfang Li “家政服务员的发 展现状 及问题研究” (Master's thesis Zhengzhou University, 2015) (Research on the Development of and Problems Facing Domestic Workers), at 30 -34.

¹⁷⁵ Li, above n 174, at 30 -34.

Organisational control precariousness relates to precariousness that derives from workers' lack of control over their work.¹⁷⁶ It is a broad definition that covers all situations where the legislation is not clear enough so workers have to be subject to employers' interpretations of the legislation.¹⁷⁷ In China, organisational control precariousness is not only connected to workers' lack of legal protection but also to their lack of channels to assert their rights. In particular, insufficient labour inspection, employees' limited access to justice and the incompetence of trade unions contribute to employing units' interpreting the legislation in a way that is unfavourable to workers.

(a) Inadequate labour inspection contributes to poor enforcement of the labour protection law

If the laws and regulations of labour protection cannot be enforced, the legal rights prescribed by legislation mean nothing to workers.¹⁷⁸ Inadequate labour inspection is a factor that contributes to poor enforcement of the labour protection law in China.¹⁷⁹ Labour inspection has an important role in ensuring the enforcement of laws and regulations of labour rights. According to the Labour Laws and the Regulation on Labour Inspection, labour inspection authorities are responsible for protecting workers' legal labour rights by inspecting enterprises and individual economic organisations' enforcement of labour protection and social security,¹⁸⁰ and for correcting and punishing those who have violated relevant rules.¹⁸¹ However, the defective labour inspection legislation, inadequacy of human resources and

¹⁷⁶ Kountouris, above n 11.

¹⁷⁷ Ibid.

¹⁷⁸ Jun Guo “《劳动法》执行大于修改” 2005(2) China Labor (The Enforcement of the Labour Law is More Important than Revising it), at 18.

¹⁷⁹ Ibid, at 18.

¹⁸⁰ Regulation on Labour Protection Inspection(劳动保障监察条例) (China), the State Council of the PRC, 01 November 2004, entered into force 01 December 2004, article 1 and 2.

¹⁸¹ Ibid, article 18.

facilities, and the lack of a neutral status limit the function of labour inspection in ensuring the enforcement of the labour protection law.¹⁸²

Firstly, overlaps of the functions between labour inspection and labour arbitration in matters such as disputes settlement relating to social insurance, wages and working hours are detrimental to the function of the labour inspection.¹⁸³ While in theory workers can choose either labour inspection or labour arbitration to resolve their disputes with their employing units, the obligation shifting between these two authorities leads to the difficulty for workers to access either of these two channels.¹⁸⁴ Moreover, inconsistent judgment and enforcement from these two authorities can negatively affect the credibility of both legislation and authorities.¹⁸⁵

Secondly, the legislation on labour inspection fails to provide labour inspection authorities with measures that are serious enough to deter employers from violating the labour protection law. The Regulation on Labour Protection Inspection¹⁸⁶ does not give labour inspection authorities the power to take coercive measures, such as seizing property or freezing bank accounts, to punish employing units that violate labour protection law.¹⁸⁷ Therefore, even labour inspection authorities find that employers have the intention of evading their responsibility, they can only give them a warning, order employers to pay the wages or impose a fine on employers.¹⁸⁸ If employers do not accept the labour inspection authorities' order or

¹⁸² Yujuan Zhai “中国劳动监察的困境与挑战——以劳动行政部门的屡屡败诉为例” 2008 2008(8) Public Administration & Law (The Difficulty and Challenge of the Labour Inspection in China: the Prevalence of Lawsuit Against Labour Authorities), at 79.

¹⁸³ Ibid, at 76.

¹⁸⁴ Jihua Liu and Lili Xie “我国劳动保障监察法律问题研究” 2012 29(5) Journal of Zhejiang Sci-Tech University (Research on Problems in the Chinese Labour Inspection Legislation).

¹⁸⁵ Rui Zhu “论我国劳动保障监察法律制度的完善” 2014(6) Academic Exploration (On the Perfection of the Legal System of Labor Security Supervision of China), at 57.

¹⁸⁶ Liu and Xie, above n 184, at 768.

¹⁸⁷ Ibid, at 768-769.

¹⁸⁸ Regulation on Labour Protection Inspection, above n 180.

fine, the latter still need to apply for an enforcement order from the court.¹⁸⁹ Such a long process gives employers the opportunities to transfer their property and to escape their legal responsibility.¹⁹⁰

The low financial punishment standards imposed by labour inspection authorities are also not serious enough to deter employers from violation of the labour protection law.¹⁹¹ The income of workers has increased significantly since the promulgation of the Regulation on Labour Protection Inspection in 2004. For example, the average wage in Shenzhen city has increased from 2551 yuan in 2004 to 8348 yuan in 2017.¹⁹² However, the level of the fine stipulated in the legislation has not changed since its promulgation. As a result, the amount of the fine is not high enough to deter employers from violation of the labour protection law.¹⁹³ For example, Article 25 of this regulation stipulates that if employing units violate the law on maximum working hours of workers, the labour inspection authorities can impose a monetary fine of 100 to 500 yuan per person on the employing unit.¹⁹⁴ Such a penalty is much lower than the benefit that employers could obtain from contravening the legislation.¹⁹⁵

Thirdly, a lack of competent human resources undermines the function of labour inspection. According to the Report on the Enforcement of the Labour Contract Laws Issued by the Standing committee of the National People's Congress (NPC) in 2011, there were only around

¹⁸⁹ Jincheng Xiao “我国劳动保障监察制度存在的问题及其对策研究” 2016 31(6) Journal of East China University of Science and Technology (Existing Problems in the Chinese Labour Inspection System and Countermeasures for The Problems).

¹⁹⁰ Guorong Qin “劳资均衡与劳权保障:劳动监察制度的内在功能及其实现” 2010 25(6) Journal of Henan Administrative Institute of Politics and Law (Balance of Power between Employers and Employees and the Labour Protection: the Function of Labour Inspection), at 149; Xiao, above n 189, at 97.

¹⁹¹ Hui Zhang “我国劳动监察制度的缺陷与对策分析” 2010 30(2) Journal of Daqing Normal University (Defects in the Chinese Labour Inspection Mechanism and Countermeasures for the Defects), at 40.

¹⁹² Statistics can be found on the official website of the Bureau of Statistics of Shenzhen <http://tjj.sz.gov.cn/xxgk/zfxgkml/tjsj/tjnj/201812/P020181229639722485550.pdf>.

¹⁹³ Liu and Xie, above n 184, at 770.

¹⁹⁴ Regulation on Labour Protection Inspection, above n 180, article 25.

¹⁹⁵ Liu and Xie, above n 184, at 770.

20,000 full-time labour inspectors in China in 2011.¹⁹⁶ This means that one single labour inspector was responsible for the inspection of 1,700 employing units and 20,000 employees.¹⁹⁷ Even the number of labour inspectors have increased in recent years, the problem of lack of labour inspector still existing because the increase has not caught up with the increase of employees in China.¹⁹⁸

In addition to the shortage of labour inspectors, a lack of professional skills among labour inspectors also undermines the function of the labour inspection.¹⁹⁹ Labour inspection involves comprehensive professional skills, and a deep understanding of the law and regulations on labour protection and human resource management skills. However, it is common for labour inspection authorities to use part-time labour inspectors due to the lack of full-time inspectors.²⁰⁰ These part-time workers do not usually have the necessary occupational skills to perform labour inspection.²⁰¹ Insufficient occupational training for labour inspectors also contributes to the overall low competence of labour inspectors in China.²⁰²

Finally, labour inspection authorities' lack of a neutral status also makes them easily influenced by government policies.²⁰³ The labour inspection authority is a public institution under the labour and the social security bureau,²⁰⁴ and their personnel and finance are subject

¹⁹⁶ Report on the Enforcement of the Labour Contract Laws Issued by the Standing committee of the NPC (全国人民代表大会常务委员会执法检查组关于检查《中华人民共和国劳动合同法》实施情况的报告), 24 October 2011, available at: http://www.npc.gov.cn/wxzl/gongbao/2011-12/30/content_1686393.htm.

¹⁹⁷ Ibid.

¹⁹⁸ Guoqing Huang and Ying Jiang “我国碎片化劳动监察模式的困境、挑战与发展” 2016(9X) China Labor (The Difficulty, Challenge and Development: Fragmented Labour Inspection Mechanism in China), at 57.

¹⁹⁹ Report on the Enforcement of the Labour Contract Laws Issued by the Standing committee of the NPC, above n 196.

²⁰⁰ Jinlun Yue and Wenjia Zhuang “转型中的当代中国劳动监察体制: 基于治理视角的一项整体性研究” 2009 5 Journal of Public Administration (The Chinese Labour Inspection Mechanism in the Transitional Period), at 109-110.

²⁰¹ Ibid, at 109-110; Xiao, above n 189, at 96.

²⁰² Yue and Zhuang, above n 200, at 109-110; Xiao, above n 189, at 96.

²⁰³ Xiao, above n 189, at 96-97.

²⁰⁴ Regulation on Labour Protection Inspection, above n 180, article 13.

to the labour and the social security bureau.²⁰⁵ When local governments set economic development targets or increase of GDP as the top priority, they may be afraid of that strict labour inspection will affect the attraction for investments and thus decrease tax revenues.²⁰⁶ Consequently, local governments thus might not apply strict labour inspection to enterprises that foster the infringement of workers' labour rights.²⁰⁷

(b) Insufficient access to justice for workers leads to low legal cost of infringing workers' legal rights

Workers' inadequate access to justice undermines their ability to recover their losses when employing units infringe their rights. It gives employers a higher chance of avoiding their legal responsibility and punishment when they infringe their employees' legal rights.

Three channels have been set up to settle disputes between employees and employers, namely labour dispute mediation, labour dispute arbitration and labour dispute litigation.²⁰⁸ However, these procedures are only available to address disputes between employers and employees. Workers who do not have any employment status are thus unable to use these channels to settle their disputes. In addition, even for workers who have official employment status, the defects of these labour dispute settlement channels contributes to employees' inadequate access to justice.

Lack of access to credible labour dispute mediation

²⁰⁵ Ibid.

²⁰⁶ Zhu, above n 185, at 58.

²⁰⁷ Ibid, at 58.

²⁰⁸ According to the article 79 of the Labour Law of the PRC, when a labour dispute arises, parties may apply to the labour dispute mediation committee of their employing unit for mediation; if the mediation fails and either party requests arbitration, that party may apply to the labour dispute arbitration committee for arbitration. Either party may also directly apply to the labour dispute arbitration committee for arbitration. If any party is not satisfied with the decision of arbitration, the party may file a lawsuit to the people's court.

Labour dispute mediation is a channel for employing units and employees to resolve their disputes with the assistance of a third party.²⁰⁹ A broad definition of mediation includes mediation before the application of arbitration,²¹⁰ mediation during arbitration,²¹¹ and mediation before the start of litigation.²¹² Labour dispute mediation in this thesis only includes the labour dispute mediation stipulated by the Labour Dispute Mediation and Arbitration Law,²¹³ which is mediation before the application of labour arbitration.

While labour dispute mediation has the advantages of the efficient settlement of disputes and minimising the damage of the relationship between employers and employees,²¹⁴ such a channel is not available to all employees, especially workers in small businesses. According to the Labour Dispute Mediation and Arbitration Law, a labour dispute mediation committee shall be composed of representatives from the staff and workers, representatives of the employing unit, and representatives of the trade union.²¹⁵ A representative of the trade union shall be the chairperson of the committee.²¹⁶ This organisation was developed in order to ensure the fairness of the mediation. However, many employing units have not set up their own mediation committees.²¹⁷ In employing units where the mediation committee has not been established, disputes between employers and employees are usually negotiated by both sides directly.²¹⁸

²⁰⁹ Yu Fan *ADR原理与实务* (Xiamen University Press, Xiamen, 2002) (Theory and Practice of ADR), at 35.

²¹⁰ Law on Labour Dispute Mediation and Arbitration of the PRC (《中华人民共和国劳动争议调解仲裁法》), 29 December 2007, entered into force 01 May 2008, article 10.

²¹¹ *Ibid.*, article 42.

²¹² The Civil Procedure Law of the PRC (《中华人民共和国民事诉讼法》), 09 April 1991, amended 28 October 2007, 31 August 2012 and 27 June 2017, article 9.

²¹³ Law on Labour Dispute Mediation and Arbitration of the PRC, above n 210.

²¹⁴ Wei Jiang *人民调解学概论* (Law Press·China, 1990) (Introduction of People's Mediation Study), at 41.

²¹⁵ Law on Labour Dispute Mediation and Arbitration of the PRC, above n 210, article 10.

²¹⁶ The Labour Law of the PRC, above n 138, article 80.

²¹⁷ Only 6% of companies have established a labour disputes mediation committee, see Yujuan Zhai “劳动争议ADR研究——兼及《中华人民共和国劳动争议调解仲裁法》之解读” 2009(4) *Law Review* (Research on the Labour Dispute ADR and the Interpretation of the Labour Dispute Mediation and Arbitration Law of the PRC), at 136.

²¹⁸ *Ibid.*

Even in enterprises where a mediation commission has been established, the mediation can easily be manipulated by employing units²¹⁹ and mediators are not usually adequately trained in mediation skills and labour protection law.²²⁰ Consequently, labour dispute mediation lacks credibility and many employees do not choose this channel to settle disputes with their employers.²²¹

Labour dispute arbitration does not ensure workers' access to justice

Labour dispute arbitration avoids the disadvantage of high cost and time-consuming litigation, but it is more professional than labour dispute mediation.²²² Among 812,461 labour disputes in 2016, 368,409 disputes were resolved through labour arbitration, which is the highest among labour dispute mediation, arbitration and litigation.²²³

However, while labour arbitration plays an important role in resolving disputes between employees and employers, the administrative nature of labour dispute arbitration affects its credibility negatively.²²⁴ Labour dispute arbitration committees are subordinate to and regulated by local labour administration authorities.²²⁵ They are also funded by the

²¹⁹ Ping He “我国劳动争议调解制度功能缺失之反思” 2014 32(1) Hebei Law Science (Reflection on the Inadequate Function of the Labour Dispute Mediation System in China), at 74.

²²⁰ Xiong Li “我国劳动争议调解制度的理性检讨与改革前瞻” 2013(4) China Legal Science (Review of the Labour Dispute Resolution Mechanisms in China and Reform Recommendations), at 161.

²²¹ Ibid, at 162.

²²² Jing Yang “劳动仲裁调解在解决劳动争议中的地位” 2014(1) Academic Exploration (The Function of Mediation and Arbitration in Settlement of Labour Disputes).

²²³ National Bureau of Statistical and Ministry of Human Resources and Social Security *China Labour Statistical Yearbook 2016* (China Statistics Press, Beijing, 2016), available at: <http://www.mohrss.gov.cn/2016/indexeh.htm>.

²²⁴ Zhai, above n 217, at 139.

²²⁵ Liwen Xu “我国劳动争议处理制度存在的问题与完善之策” 2014 2 Journal of Beijing Administrative College (Problems in the Labour Dispute Resolution Mechanisms in China), at 94; Yang Cao “我国劳动人事争议调解仲裁现状、问题及对策研究” 2017(4) Journal of Beijing Vocational College of Labour and Social Security (Current Situation, Problems and Countermeasures: the Labour Dispute Mediation and Arbitration in China), at 19-29; Pengyan

government.²²⁶ Therefore, local government policy, such as the emphasis on economic development, can affect the justice of their decisions. Consequently, labour dispute arbitration does not guarantee employees' access to justice.

Litigation does not guarantee employees' access to justice due to the lack of specially tailored procedures for resolving labour disputes

Among the three available channels developed to resolve disputes between employees and employers, litigation is the most professional and most credible one.²²⁷ However, such a channel does not guarantee employees' access to justice due to the high cost involved in litigation and the lack of a court or tribunal that is specially set up to resolve labour disputes.

China has not established a labour court or labour tribunal. Labour disputes are tried by civil courts.²²⁸ Although the Supreme Court has clarified special rules, such as the burden of proof, regarding the application of the law in the trial of labour disputes, the procedure for trying a labour dispute case is no different from the procedure for trying general civil disputes.²²⁹ Civil litigation procedures cannot meet the characteristics of labour disputes, which usually involve small amounts of money and need to be processed quickly.²³⁰ For example, when a dispute

Xiao and Fujun Li “劳动争议仲裁概念、属性及其工作特征解析” 2013(23) Human Resources Development of China (Analysis of the Concept, Nature and Characteristics of Labour Dispute Arbitration), at 97-98.

²²⁶ Article 53 of the Law on Labour Dispute Mediation and Arbitration of the PRC stipulates that no fee shall be charged for the labour dispute arbitration and the funds of a labour dispute arbitration commission shall be secured by the finance authority.

²²⁷ Changshan Fei “我国劳动争议处理模式辨析及完善” 2009 38(1) Journal of Shanghai Normal University (Philosophy and Social Sciences Edition) (Analysis and Improvement of Labour Dispute Resolution Mechanisms in China), at 37.

²²⁸ Xu, above n 225, at 95-96.

²²⁹ Guangyu Li “劳动争议诉讼中存在的问题与对策” 2009 Nomocracy Forum (Defects in the Labour Dispute Litigation Mechanism and Corresponding Solutions); Zhaodong Zhang “我国劳动争议解决机制批判与重构” 2006 24(11) Hebei Law Science (Review and Restructure on the Labour Dispute Settlement System in China).

²³⁰ Tianchang Xie “劳动诉讼制度的理论解析及其前瞻 —— 兼评周湖勇《劳动诉讼制度研究》” 2017 30(1) Journal of Wenzhou University (Social Science Edition) (Theoretical Analysis of Labour Litigation System and Its Prospect: Complementary Comment On Study on Labour Litigation System), at 5.

only involves a small amount of money, such as a few months' wages, using litigation is not economically worthwhile because the compensation they obtain could be even lower than the expenses that are spent on litigation. Consequently, litigation is not a suitable channel to resolve most labour disputes.

Moreover, the lack of a labour court or labour tribunal can lead to judges' inappropriate application of legal principles and law when they judge labour dispute cases. In practice, some judges apply principles and rules from civil law to resolve labour disputes, when they cannot conclude a judgment in accordance with labour protection law.²³¹ The incorrect application of legal principles and law can lead to judgements that do not provide justice for employees.

(c) The trade unions in China have limited functions for protecting workers

Trade unions have the responsibility to protect and improve the working condition of workers.²³² However, trade unions in China fail to fulfil such a function because they are basically political symbols. They are not organisations designed to protect workers, due to the defective legislation on trade unions and the lack of independent status of the trade unions.²³³ In particular, imperfect legislation on the establishment and operation of trade unions contributes to the lack of trade unions in private companies, and the lack of power of trade

²³¹ Xu, above n 225, at 96.

²³² According to the Constitution of Trade Union of People's Republic of China, the responsibility of the trade union are (1) protecting employees' legal rights and democratic rights, (2) mobilising and organising employees to participate in development and reform and to achieve the tasks of economic and social development, (3) representing and organising employees to participate in management of the state and the society, and democratic management of enterprises, public institutions and state organs, and (4) cultivating thoughtful, virtuous and disciplined employees by raising employees' ideological and ethical standards and scientific and cultural level.

²³³ Jianyong He "论中国工会维护职能的缺失" 2011(13) Economic Research Guide (Trade Union in China in China Lacks the Function of Protecting Workers), at 138; Meizhen Sun "中国工会维护职能缺失探析" 2004(1) Journal of Liaoning Technical University (Social Science Edition) (Factors that Result in Trade Union's Failure to Safeguard Workers), at 67-68; Jingfei Li and Bing Lyu "新时期中国工会职能需要强化和转变" 2008 10(5) Journal of Eastern Liaoning University (Social Sciences) (Function of Labor Union in China Need to Be Strengthened and Changed), at 27.

unions to protect workers.²³⁴ Moreover, trade union reliance on government and companies contributes to their lack of independent status.²³⁵ Consequently, their operation is usually controlled and administered by the government.²³⁶ Furthermore, the incompetence of workers in trade unions has a negative effect on their ability to protect workers.²³⁷

As a result of the absence of assistance from the trade unions, workers may be unable to conclude fair employment contracts with employing units due to their low bargaining power. Moreover, workers may be unable to obtain sufficient compensation when employing units infringe their legal rights due to the lack of assistance from a trade union. Trade unions' limited function on the protection of workers thus contributes to the precariousness of organisational control among workers.

(d) Precariousness of organisational control among domestic workers

Domestic workers suffer from organisational control precariousness. Their lack of employment status means that they do not have access to labour inspection and channels that are developed to resolve disputes between employees and employers. Although they can still use channels that are developed to resolve general civil disputes to resolve their disputes with homeowners or domestic service companies, these channels, as discussed in the following paragraphs, do not ensure their access to justice. In addition, the incompetence of trade unions

²³⁴ Jun Yang and Yuan Li “对工会组织法治作用缺位的理性思考——以现实中因工伤维权不畅引发的恶性案件为线索” 2010(9) Academic Exchange (The Inadequacy of Trade Union's Constitutive Law: a Study Motivated by a Worker's Difficulty to Obtain Work-related Injury Insurance Benefits), at 73-74; Shuanghong Ao and Longfei Wang ““第三部门”失灵——以工会为例” 2009(8) Political Science and Law (The Malfunction of "the Third Sector": Take the Trade Union as an Example), at 72-73.

²³⁵ Yang and Li, above n 234, at 73; Ao and Wang, above n 234, at 70-71; Lin Liao “市场经济体制下工会职能完善刍议” 2018 32(3) Journal of Changsha University (Improvement of the Function of Trade Union in a Market Economy), at 53.

²³⁶ Yang and Li, above n 234; Ao and Wang, above n 234, at 244.

²³⁷ Liao, above n 235, at 53; Hua Ouyang and Meizhen Tu “从权利的构成要素看工会权利的实现与保障” 2002 1(3) Journal of Jiangxi Agricultural University (The Essential Components of Rights: A Perspective on Realizing and Ensuring the Rights of Trade Unions), at 94.

in protecting workers contributes to the organisational control precariousness of domestic workers.

Absence of labour inspection

Domestic workers do not have access to labour protection due to their lack of employment status. As mentioned above, the prerequisite for obtaining labour protection is having regular employment status.²³⁸ Labour inspection, as a component of labour protection, thus does not apply to workers who do not have employment status. In addition, even when giving domestic workers access to labour inspection, the limited human resources of labour inspection are not enough to cover all domestic workers, who constitute more than 20 million of the workers in China. The working place of workers, which are private households, also increases the difficulty in the enforcement of labour inspection.²³⁹

The absence of labour inspection results not only in the infringement of domestic workers' rights by homeowners, but also in the difficulty for domestic workers to obtain evidence to support their claims for compensations. Domestic workers' lack of access to labour protection thus aggravates the infringement of their rights because homeowners' and domestic workers' service companies have a high chance of successfully avoid the responsibility of illegal activities.

Insufficient access to justice

Insufficient access to justice exacerbates the organisation control precariousness of domestic workers because domestic service companies and households can infringe domestic workers' rights without needing to worry about the legal consequences.

²³⁸ See Chapter 2.

²³⁹ Chuxian; Zhang Xu, Xiangui “家政工人劳动权益保护之监察” 2011 13(2) Journal of Southwest University of Political Science & Law 17 (Labour Inspection and Labour Protection for Domestic Workers).

Firstly, domestic workers do not have access to credible mediation. Disputes between homeowners and domestic workers are usually mediated by domestic service companies. Although some places have established mediation committees specifically for resolving disputes between domestic workers and homeowners or between domestic workers and domestic service companies under the local people's mediation commission, such committees have not been popularised nationwide.²⁴⁰

Compared with the mediators in people's mediation commissions, staff in domestic service companies generally have even lower knowledge of the law and mediation skills.²⁴¹ More importantly, they usually mediate disputes in favour of homeowners, who are the legal consumers of domestic services.²⁴² Consequently, domestic workers may be unable to obtain a mediation result that is favourable to the protection of their rights in these places.²⁴³ Furthermore, an agreement reached through mediation does not have legal force. It is common to find that parties go back on what they have agreed in the mediation process.²⁴⁴ Consequently, mediation does not provide an effective channel for domestic workers to resolve their disputes with domestic service companies or with homeowners.

Secondly, the arbitration available to domestic workers does not ensure their access to justice. Although labour dispute arbitration is not perfect, its low cost and quick process mean that it can be an effective channel for resolving disputes between domestic workers and homeowners or between domestic workers and domestic service companies. Labour dispute arbitration is

²⁴⁰ For example, Kunming city established the first mediation committee for resolving disputes among homeowners, domestic workers, and domestic service companies in Yunnan province in 2018.

²⁴¹ Tingting Hu and Ming Cai “武汉市家政服务行业现状、问题及对策思考” 2008(7) *Journal of Hubei University of Economics (Humanities and Social Sciences)* (Current Situation of the Domestic Service Industry in Wuhan City and Corresponding Solutions), at 66.

²⁴² Zhuqing Wang “家政工劳动权益保护立法的必要性研究” 2010 26(1) *Journal of University of Science and Technology Beijing (Social Sciences Edition)* (The Necessity of Developing Legal Protection for Domestic Workers), at 66.

²⁴³ Ibid.

²⁴⁴ Yang, above n 222, at 60; Junchao Zhou “我国劳动纠纷解决机制的实践困境与创新之维” 2012 27(6) *Journal of Sichuan University of Science&Engineering (Social Sciences Edition)* (Practical Difficulties and Judicial Innovation of Labour Disputes Solution Mechanism in China), at 30.

more professional than mediation, so it can give domestic workers a more trustworthy channel to settle disputes than the mediation. Moreover, labour arbitration has simpler procedures and involves a lower cost than litigation. Such a channel thus meets domestic workers' demand for low cost and speedy procedures to resolve their disputes with homeowners and with domestic service companies.

However, domestic workers do not have access to labour dispute arbitration due to their lack of official employment status. Although domestic workers can use general arbitration to resolve their disputes with domestic service companies or homeowners, and some cities even have established arbitration centres specifically for resolving such disputes among domestic service companies, homeowners and domestic workers, the arbitration can only be initiated when all involved parties agree to use the arbitration process to resolve their disputes.²⁴⁵ However, as mentioned in Chapter One, a large proportion of domestic workers have not signed a written contract with homeowners, and so they have not reached an agreement on using arbitration to resolve their disputes. When homeowners or domestic service companies have infringed domestic workers' legal rights, using arbitration to resolve disputes can result in their obligation to pay compensation to those domestic workers. Homeowners or domestic service companies are thus unlikely to agree to the use of arbitration to resolve their disputes with domestic workers. Consequently, arbitration does not ensure domestic workers' access to justice.

Finally, the high cost and lengthy process of litigation mean that it does not ensure the access to justice of domestic workers. Most of the disputes between domestic workers and domestic service companies or between domestic workers and homeowners involve only small amounts of money. Consequently, the litigation service fees and the cost of hiring a lawyer may be higher than the value of the compensation that they can obtain after they win the lawsuit.

²⁴⁵ The Arbitration Law of the PRC (中华人民共和国仲裁法), 31 August 1994, amended 27 August 2009 and 01 September 2017, article 4.

Therefore, using litigation to recover loss is not an economically rational channel for most domestic workers.

Even if the compensation is higher than the cost of using litigation to resolve the dispute, the long process of litigation discourages domestic workers from using litigation to assert their rights.²⁴⁶ According to the Civil Procedure Law²⁴⁷, the process of a labour dispute lawsuit takes up to 11 months.²⁴⁸ Such a long process is not only time-consuming for domestic workers, but it can also affect their income negatively. Domestic workers may be required to attend trials or provide evidence requested by the courts or lawyers. When domestic workers attend trials, a day off means the loss of income for them. The unpredictability of domestic work means that they could even lose a job opportunity altogether.

Trade union's limited function on the protection of domestic workers

According to the function of the trade unions stipulated in the law, trade unions could play an important role in the protection of domestic workers. It could increase the occupational skills and legal awareness of domestic workers through measures such as providing occupational and legal knowledge classes. It could also provide domestic workers with legal advice or even negotiate with homeowners or domestic service companies on behalf of the domestic workers when the homeowners or domestic service companies infringe the domestic workers' legal rights. In addition, trade unions could unify domestic workers and strive for domestic workers' rights. Trade unions could thus relieve the isolation of domestic workers when working in private households. However, in practice, the trade unions of domestic workers, as with the trade unions of other workers, do not have independent status and do not have adequate legal power to protect their workers. Consequently, although trade unions can provide a platform for domestic workers to share their feelings and experiences with other domestic workers and provide domestic workers with benefits such as free or subsidised physical examinations and

²⁴⁶ Yan Wang “家政纠纷的多元化解解决机制” (Master's thesis, Southwest University of Political Science and Law, 2012) (Diversity of Dispute Settlement Mechanisms for Domestic Services), at 13-14.

²⁴⁷ The Civil Procedure Law of the PRC, above n 242.

²⁴⁸ Li, above n 229, at 97.

occupational training, it has a limited ability to improve domestic workers' social status and to protect their legal rights.

C Conclusion

This chapter introduces the social background to the emergence of precarious workers in the first section, and the legal and regulatory factors that contribute to the precarious status of workers in the second section. The second section uses Kountouris's legal determinant of precariousness as a framework to reveal that both formal and informal workers can be precarious in China. It also shows that domestic workers are a typical group of precarious workers. Their precariousness not only results from their lack of access to labour protections but also results from the particular characteristics of domestic work, such as unpredictable working hours and inherent temporality. Therefore, in order to improve the precarious status of domestic workers, China should develop legal protection for domestic workers in accordance with the special characteristic of domestic work.

IV Chapter 4 The Capability Approach: a suitable theoretical framework to address the precarious status of the domestic worker

The last chapter showed that domestic workers are typical precarious workers. In order to provide a legal recommendation to improve the precarious status of domestic workers, this chapter firstly identifies legal and regulatory problems that contribute to their precarious status. The analysis of these problems is underpinned by the capability approach,¹ which has been developed by Amartya Sen and Martha Nussbaum. In particular, this thesis focuses on the analysis of legislation on income, rest and social insurance of domestic workers. These three matters, as highlighted in chapter three, are key reflections of precarious status. Therefore, the improvement of legal protection in these three areas is likely to contribute to the improvement of the status of domestic workers. Moreover, narrowing down the focus of the analysis to these factors contributes to an in-depth and comprehensive analysis of the legislation within the limited scope of a PhD dissertation.

Against this backdrop, this chapter is organised into two sections. The first section argues that Nussbaum's central capability list improves the normative power of the capability approach in terms of researching the inadequate capabilities of domestic workers in China. The second section explains the connection between the defective legislation and inadequate capabilities of domestic workers regarding obtaining adequate income, rest and social insurance.

A The capability approach as a tool to change the precarious status of domestic workers

As discussed in the introductory chapter of this thesis, the capability approach provides a suitable theoretical framework to evaluate legislation on the protection of domestic workers in China. The analysis of domestic workers' inadequate capabilities in this thesis is based on

¹ Amartya Sen, "Equality of What?" The Tanner Lecture on Human Values, delivered at Stanford University, May 22, 1979.

Nussbaum's list of central capabilities.² Nussbaum, as a lawyer and pioneer of the capability approach, focuses on the institutionalisation of characteristics that enhance the capabilities of individuals.³ Nussbaum's goal in her research on the capability approach is thus different from Sen, who focuses on the evaluative and comparative function of this approach.⁴ In other words, Sen's theory of development as freedom is based on the evaluation of the social provision effect on the improvement of people's freedom;⁵ in contrast, Nussbaum proposes the constitutional incorporation of desired capabilities.⁶

Nussbaum provides a list of central capabilities, which include the following: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; living together and concern for other species; play; and control over one's environment.⁷ In contrast, Sen's approach does not provide a direction to the institutionalisation of the capability approach. He observes that desired capabilities should be decided through democratic deliberation processes.⁸

Although Sen and Nussbaum have not reached a consensus on a list of central capabilities, their fundamental principles in the formation of a capability list are the same. Nussbaum's list is not in conflict with Sen's idea on the formation of a capability list, but increases the normative power of the capability approach in legal research.

² Martha C Nussbaum "Poverty and Human Functioning: Capabilities as fundamental entitlements" 2006 *Poverty and inequality*, at 58-59.

³ At 74-75; see also John M. Alexander "Capabilities, human rights and moral pluralism" 2004 8(4) *The International Journal of Human Rights*, at 457-458.

⁴ Ingrid Robeyns "The Capability Approach: a theoretical survey" 2005 6(1) *Journal of Human Development* 96, see also Martha Craven Nussbaum *Women and human development: the capabilities approach* (Cambridge University Press, New York, 2000) at 12.

⁵ Amartya Sen "Development as Freedom (Alfred A. Knopf Inc.: New York)" 1999, at 4.

⁶ Nussbaum, above n 2, at 70-71; also see Robeyns, above n 4, at 103.

⁷ Nussbaum, above n 2, at 74-75

⁸ Amartya Sen "Human Rights and Capabilities" 2005 6(2) *Journal of Human Development* 151, at 158-163.

Sen argues that a pre-determined list of capabilities contradicts the importance of public participation.⁹ He explains:

The problem is not with listing important capabilities, but with insisting on one-determined canonical list of capabilities, chosen by theorists without any general social discussion or public reasoning. To have such a fixed list, emanating entirely from pure theory, is to deny the possibility of fruitful public participation on what should be included and why.¹⁰

Sen's idea is reasonable. Society is changing, and every society has its own characteristics. Even within a society, different groups may value things differently. Therefore, there is no listing that can suit the context of every society and group. Consequently, it is hard to justify the legitimacy of a capability list without public participation.

Nevertheless, Nussbaum's central capability list is not against Sen's idea in terms of the requirement of public participation in determining desired capabilities. Firstly, Nussbaum does not claim that her list provides full coverage of people's capabilities: instead, she only provides a list of the most basic capabilities, which are required to achieve the minimum requirements of justice.¹¹ Secondly, Nussbaum mentions that her list is open-ended and humble: it can always be debated and remade.¹² This means that if her list includes capabilities that are not valued in a given society, the society can modify the list to suit its own social contexts. Therefore, Nussbaum's list of central capabilities is neither universal nor definitive: individual countries can still expand or narrow down the scope and develop concrete standards through public participation.

Nussbaum's list of central capabilities improves the normative power of the capability approach. The list provides a way forward for countries to develop institutions to improve

⁹ Ibid, at 158.

¹⁰ Ibid.

¹¹ Martha Craven Nussbaum *Frontiers of justice: disability, nationality, species membership* (The Belknap Press, Cambridge, Mass, 2006) at 71.

¹² Nussbaum, above n 2 , at 77; Nussbaum, above n 2 , at 75; Martha C Nussbaum "Capabilities and human rights" 1997 66 Fordham L. Rev., at 286.

people's capabilities. Although the list does not cover the capabilities set for every individual, it contains people's basic capabilities such as life, bodily health and bodily integrity which are necessary for people to have a dignified life.¹³ Such a list thus is especially beneficial to the development of institutions for people, such as domestic workers in China, whose most basic legal rights are not guaranteed. Their lack of legal protection means that they are more likely to have deficiencies in basic capabilities than those who are well protected by legislation. As will be revealed in the next section, the legislation in China has not ensured the basic capabilities of domestic workers. Adopting the list of central capabilities to examine the legislation applicable to domestic workers can identify the most basic and urgent problems that need to be resolved. Unpacking the problems of the current legislation constitutes a stepping-stone toward establishing a solution towards reducing the legal precariat of domestic workers.

B Inadequate capability to obtain income, rest and social insurance

Income, rest and social insurance are connected to the central capabilities closely; however, the legislation applicable to domestic workers does not guarantee a stable and sufficient income for domestic workers to afford the most basic living expenses for themselves and their family members, enough rest to stay healthy, and access to all social insurance plans.

1 The capability of domestic workers to obtain an adequate and stable income is not secured by legislation

An adequate and stable income is important to ensure domestic workers' central capabilities. Although income is not an evaluative standard of well-being according to the capability approach, it is an important means to enlarge people's choices.¹⁴ It is important to the purposes

¹³ Nussbaum, above n 2, at 72.

¹⁴ Robeyns, above n 4, at 97.

of all of the individuals to achieve their projects or goals.¹⁵ For example, adequate income is linked to adequate food and decent shelter, which is essential to the bodily and mental health of people and their family members. However, domestic workers have low wages and are vulnerable illegal deductions and default by homeowners.¹⁶ As a result, they may be unable to obtain a stable and sufficient income that covers even the most basic expenses for themselves and their families.

Defective legislation for the protection of the wages of domestic workers contributes to an inadequate capability to obtain adequate and duly income. On the national level, the only legislation that stipulates wage protection for domestic workers is the Provisional Regulation on the Domestic Service Industry.¹⁷ While it stipulates that consumers of domestic services shall not withhold or deduct from domestic workers' wages,¹⁸ it has not provided specific standards regarding the payment of wages. Local regulations also have not provided effective legal protection of the wages of domestic workers. For example, the Regulations on the Domestic Service Industry of Jiangsu Province¹⁹ stipulates that homeowners shall protect the legal rights of domestic workers,²⁰ but it does not clarify what legal rights they have concerning income. Therefore, all terms regarding the payment of the wages of domestic workers can be decided through negotiation. In other words, all the rules regarding the protection of wages under the labour protection law, such as the minimum wage, do not apply to domestic workers. Although domestic workers can theoretically conclude an agreement that gives them a decent income through negotiation, the low bargaining power of domestic workers contributes to their low wages and unfavourable terms regarding payment of wages

¹⁵ Tania Burchardt "Time, income and substantive freedom: A capability approach" 2010 19(3) Time & society, at 319.

¹⁶ See Chapter 3.

¹⁷ The Provisional Regulation on Domestic Service Industry (家庭服务业管理暂行办法)(China), the Ministry of Commerce of PRC, entered into force 1 February 2012.

¹⁸ Ibid, article 25.

¹⁹ Regulations on Domestic Service Industry of Jiangsu Province (for trial implementation) (江苏省家政服务行业管理规定(试行)), 2006.

²⁰ Ibid, article 28.

to them.²¹

The legislation applicable to domestic workers does moreover not provide remedies and punishments to deter homeowners from illegally deducting or defaulting on the wages of domestic workers. While both national and local legislation stipulates that homeowners shall not default on or deduct from the wages (or service fees) of domestic workers illegally,²² these regulations do not provide any legal liability of homeowners when they fail to pay domestic workers fully and duly. It means that homeowners only need to assume the legal liabilities that are stipulated in civil law when they do withhold or deduct the wages of domestic workers. These liabilities include paying out the illegally deducted and defaulted wages and, when damage for breach of contract is agreed, paying the damages to domestic workers.²³ However, a large proportion of domestic workers have not even signed a written contract with homeowners, not to mention establishing damages for breach of contract. Consequently, when domestic workers take legal action to claim their rights and obtain a decision in their favour, domestic workers only need to pay off illegally deducted or defaulted wages. Homeowners may even be able to evade the liability of paying the wages to domestic workers due to the insufficient access of the latter to justice.²⁴

By contrast, employers not only need to pay compensation to their employees, but they may also need to pay financial penalties to the labour authorities or even assume criminal responsibility when they fail to pay their employees sufficiently and duly. In other words, while domestic workers are as vulnerable to illegal wage deductions and defaults as other

²¹ Haiyan Yang “家政服务行业发展困境及其突破路径” 2013(5) Reform and Development (Predicament of the Development of the Domestic Service Industry and Solutions), at 86-87.

²² The Provisional Regulation on Domestic Service Industry, above n 17. Article 25 of this Regulation stipulates that consumers shall guarantee the legal rights of domestic workers, respect their job and their personality, provide accommodation and food in accordance with the agreement, ensure the basic daily and monthly rest periods. They shall not abuse or assault domestic workers, shall not default on or deduct from the wage of domestic workers, and shall not detain the original copy of domestic workers’ identity card, occupational certificates, and other qualification certificates.

²³ Contract Law of the PRC (中华人民共和国合同法), 15 March 1999, entered into force 01 October 1999, article 107.

²⁴ See Chapter 3.

workers are,²⁵ the legislation does not protect them at the same level as it does to other workers.

2 *The legislation does not guarantee adequate rest periods for domestic workers*

The capability to obtain adequate rest is related to the central capabilities of workers. Excessive working hours are detrimental to the physical and mental health of workers.²⁶ Long working hours increase workers' risk of contracting disorders such as heart disease, type two diabetes, and depression.²⁷ Such negative effects are especially high among rural migrant workers who are often poorly educated, female, informally employed, or self-employed.²⁸ In addition, inadequate regular rest, such as lack of regular daily rest or paid annual leave, contributes to workers' inadequate discretionary time, which is important to the enhancement of their other central capabilities. As another all-purpose means, along with income, for people to achieve their goals,²⁹ adequate discretionary time enables people to think, play and build relationships with others. For example, workers may be unable to attend recreational activities or spend time with their families due to insufficient discretionary time.

While adequate rest is of interest to workers' central capabilities, the legislation applicable to domestic workers does not limit the daily working hours of domestic workers and does not give domestic workers any rights with respect to weekly rest, holiday and leave. Moreover, although the informality of domestic work gives domestic workers the freedom to choose their the hours and intensity of their work, the inadequate income resulting from legal and

²⁵ See Chapter 3.

²⁶ Lucía Artazcoz and others "Understanding the relationship of long working hours with health status and health-related behaviours" 2009 *Journal of Epidemiology & Community Health*, at 526; Anne Spurgeon, J Malcolm Harrington and Cary L Cooper "Health and safety problems associated with long working hours: a review of the current position" 1997 54(6) *Occupational and environmental medicine*, at 367.

²⁷ Monique Van der Hulst "Long work hours and health" 2003 *Scandinavian journal of work, environment & health*, at 171–188.

²⁸ Qingbo Huang and Zhihong Sa "农民工工作时间与其身心健康的关系" 2015(3) *中国健康心理学杂志* (The Connection between Working Hours and Physical and Mental Health among Rural-urban Migrant Workers in China), at 362.

²⁹ Burchardt, above n 15, at 319.

regulatory factors, such as defective legislation on wages and social insurance, forces them to work long hours.

The Provisional Regulation on Domestic Service Industry is the only legislation that has mentioned the work hour of domestic workers. It stipulates that consumers shall ensure domestic workers' basic daily sleeping hours and monthly rest.³⁰ However, the regulation has not explained what basic daily sleeping hours and monthly rest are. Consequently, domestic workers cannot use this regulation to claim their daily or weekly rest from homeowners. Moreover, the legislation has not given domestic workers any right concerning holiday and leave, such as the right to take days off on public holidays or the right to have annual leave. Consequently, all terms regarding the work hours, holidays and leave of domestic workers are determined through negotiation between domestic workers and homeowners.

However, free negotiation between domestic workers and homeowners does not ensure domestic workers the capability of obtaining sufficient rest. While domestic workers may be able to conclude an agreement that gives them equal working conditions and legal protection with other workers, in practice, the working hours and holidays of domestic workers are usually decided unilaterally by householders.³¹ Refusing the decision of a homeowner can lead to the loss of a job, so domestic workers have to accept householders' arrangements if they still need the job.³²

The lack of legal protection for the rest time of domestic workers also negatively affects people's attitudes towards the necessity of providing domestic workers with adequate rest. Legislation has the function of directing the behaviours of people.³³ It guides people by

³⁰ The Provisional Regulation on Domestic Service Industry, above n 17, article 25.

³¹ Xiaoping Sun, Qiang Ren and Jiangyu Wei “家政服务工作的法律属性研究” 2012 29(1) Journal of Shenzhen University (Humanities&Social Sciences) (Domestic Service as a Legal Entity) , at 103.

³² Hongfang Wang “非正规就业--家政服务员权益问题研究” 2006 12(2) Journal of Chongqing University (Social Science Edition) (Informal Employment — Protection of Domestic Workers), at 75.

³³ Wenxian Zhang 法理学.第3版 (Law Press China, Beijing, 2007) (Jurisprudence (3rd Edition)) at 83.

influencing their values and their concept of right and wrong.³⁴ The lack of protection regarding working hours, regular daily rest, holidays and leave of domestic workers leads people to think that it is reasonable to require domestic workers to work long hours, or to be on call around the clock as long as they have paid them corresponding remuneration. For instance, some householders think their live-in domestic workers should be on-call around the clock as they have paid them a higher wage than live-out domestic workers and provided them with free food and accommodation.³⁵

In addition to the lack of legal protection on working hours and holidays of domestic workers, the inadequate legal protection on income and social insurance of domestic workers undermines their capability to obtain adequate rest. While low-income workers can have enough rest if they do not work for long hours, their pressure to earn enough income to afford their families' living expenses usually means that they have to work long hours to compensate for their low wages.³⁶ Such a phenomenon is especially obvious among migrant domestic workers in China.³⁷ Insufficient legal protection on the wages of domestic workers contributes to their low or unstable income. Moreover, the lack of social insurance not only contributes to their loss of income when they are injured or retired, but it also increases their expenditure when they fall ill. Consequently, in order to compensate for their low income, and to secure their source of income, they usually need to accept homeowners' requirements such as

³⁴ Ibid, at 83.

³⁵ Wang, above n 32, at 75.

³⁶ Burchardt, above n 15, at 319.

³⁷ Jiqiang Guo “中国城市次级劳动力市场中民工劳动供给分析——兼论向右下方倾斜的劳动供给曲线” 2005(5) *Social Sciences in China*; Xiaolan Luo “向右下倾斜的非农劳动供给曲线——来自中国健康和营养调查的证据” 2007(10) *Chinese Rural Economy* (Low-income Workers have Long Working hours: Analysis of Data from the China Health and Nutrition Survey); Dan Nie “农民工低工资率与国民福利损失的经济分析——对经典劳动供给理论的拓展” 2007 33(10) *Journal of Finance and Economics* (A Economic Study on Migrant Workers' Low Wage and National Welfare Loss); Yiran Xia “低工资水平下城市农民工的劳动供给模型” 2010(3) *Chinese Journal of Population Science* (The Labor Supply Curve of Migrant Workers from Rural Areas to Cities under Low-wage Rates: Based on a Survey in Wenzhou City).

working long hours, being on-call around the clock, and working without holidays.³⁸ For the same reason, even when domestic workers have agreements with households regarding working hours, many of them work longer than the agreed hours.³⁹

3 *The capability of domestic workers to obtain social insurance plans*

The capability to obtain social insurance relates closely to the central capabilities of domestic workers. The inadequate capability of domestic workers to obtain social insurance leads to their limited economic resources when they are retired, ill, injured, unemployed or pregnant. The lack of ability to obtain financial support in these conditions means that they may be unable to afford any expenses arising from these situations. Without a pension and unemployment insurance to provide them with financial support when they are retired or unemployed, they may be unable to feed themselves adequately or to obtain adequate shelter, which is essential to their bodily health. Without medical insurance, they may be unable to obtain appropriate treatment when they are injured or ill. To reduce medical costs, they may have to go to substandard clinics to treat their injuries or diseases.⁴⁰ In extreme situations, they may be unable to obtain any treatment at all and instead hope for self-healing.⁴¹ Even

³⁸ Jianfei Li and Juan Shi “论我国劳动法律调整方式从一元化向多元化的转变” 2012 27(2) Journal of Henan Administrative Institute of Politics and Law (Development of the Labour Protection in China: a Transition from a Unitary Approach to a Multi-faceted Approach), at 134.

³⁹ Lin Zhang and Yi Yang “家政女工体面劳动赤字的社会排斥分析--基于武汉市的调查” 2014(12) Hubei Social Sciences (An Analysis of Domestic Workers' Social Exclusion: Based on a Survey in Wuhan city), at 55-56.

⁴⁰ Lin Wang “论中国农民工医疗保障制度的完善” 2012(1) Scientific Socialism (Improvement of the Medical Insurance Plan for Migrant Workers in China), at 112; Bing Zhang “黑诊所的形成原因与整治对策” 2007 27(5) Chinese Rural Health Service Administration (Factors that Lead to the Existence of Illegal Clinics and Solutions for Prohibiting Illegal Clinics), at 382.

⁴¹ Qin Zhou, Sen Tian and Jie Pan “均等下的不公——城镇居民基本医疗保险受益公平性的理论与实证研究” 2016(6) Economic Research Journal (Injustice in Equalisation: Theoretical and Empirical Analysis on Beneficial Equity of the Basic Medical Insurance for Urban Residents in China), at 177,182 ; Qin Zhou, Xuezheng Qin and Yan Yuan “农民工的实际医疗服务可及性——基于北京市农民工的专项调研” 2013(9) Insurance Studies (Migrant Workers' Real Accessibility to Medical Services: Based on a Special Survey of Rural-to-Urban Migrant Workers in Beijing), at 118, Jing Song and others “南京市农民工卫生服务利用的调查研究” 2010 24(5) Chinese Primary Health Care (The Empirical Research on the Availability of Health Services for Migrant Workers in Nanjing City) at 10-11; Linwei Yu and Xiaoying Chen “农民工就医意向选择及其影响因素的实证分析——基于温州的调查”

if workers are not seriously injured or ill, their inadequate capability to obtain social insurance still reduces their standard of living. Especially in the case of low-income workers, extra costs on top of their already straitened financial circumstances will result in their lack of the necessary economic resources to sustain their basic living expenses. Consequently, the lack of financial support when they are injured or ill is not only detrimental to their capability to have bodily health, but it also reduces their capability to live to the normal length of human life.

However, domestic workers do not have access to all social insurance plans. The regulatory obstacles that hinder internal migrant workers from using their medical insurance in cities other than the city where the insurance is purchased also undermines migrant domestic workers' enjoyment of social insurance.

Social insurance in China includes social insurance for workers and social insurance for residents.⁴² Social insurance for workers includes endowment insurance, medical insurance, maternity insurance, unemployment insurance and work-related injury insurance.⁴³ Endowment insurance gives the basic living allowance to the worker after they are retired or lose their labour capacity. Medical insurance covers the main proportion of workers' medical expenses spent on treatment for illness. Maternity insurance gives allowances to female workers who suspend her work due to pregnancy. It covers medical expenses arising from the pregnancy and gives female workers a period of maternity leave. Unemployment insurance provides economic supports to the employees who have temporarily lost their source of

2017(1) Jiangxi Social Sciences (Factors that Influence Migrant Workers' Acceptance of Medical Treatments Based on a Survey in Wenzhou City), at 232-233.

⁴² The social insurance for workers can be subdivided into social insurance for employees of private companies and social insurance for employees of public authorities and state-owned institutes. See Sibin Yang “我国社会保障法治建设四十年:回顾、评估与前瞻” 2018 No.115(3) Journal of Beijing Administrative College (The Development of Social Security in China in the Recent 40 Years: Retrospect, Evaluation and Prospect), at 41; Wenhao Ling “我国三类基本养老保险制度改革的理念和路径” 2017(4) Socialism Studies (The Idea and Path of the Reform of Three Type of Endowment Insurance in China), at 21.

⁴³ Sibin Yang “社会保险立法述评” 2011 29(9) Hebei Law Science (The Review and Comments of Social Insurance Legislation), at 79.

income due to unemployment. Work-related injury insurance covers all medical treatment costs and provides economic compensation to workers who suffer work-related injuries.

In contrast, social insurance for residents only includes endowment insurance and medical insurance.⁴⁴ Social insurance for residents also has a lower premium, lower protection level and a narrower scope of coverage than social insurance for workers has.⁴⁵ For example, in Beijing, the average monthly pension for the endowment insurance for residents was 710 yuan in 2018,⁴⁶ while the average monthly pension for the endowment insurance for residents was 3,959 yuan.⁴⁷ Such a gap is even more significant at the national level: according to statistics released by the Ministry of Human Resources and Social Security, the average monthly pension for endowment insurance for residents was 125 yuan in 2017, and the average monthly pension for endowment insurance for workers was 2,362 yuan.⁴⁸ The narrow scope of protection and low protection level provided by social insurance for citizens means that it cannot provide workers with the most basic security, but only with a supplementary mechanism that expands the coverage of social insurance and gives nonworkers an affordance

⁴⁴ Yanzhong Wang and Junxia Wang “改革开放 40 年与社会保障中国模式” 2018(8) *Academics (Reform and Opening-up in the Last 40 Years and the Chinese Social Protection System)*, at 21.

⁴⁵ Changyuan Li and Junguo Zhang “城乡医疗保险制度整合对参保居民待遇水平的影响 ——基于三种典型整合模式的比较” 2016(2) *Qiushi (The Influence of Integration of the Medical Insurance System for Urban and Rural Citizens on the Protection Level of Medical Insurance: a Comparison of 3 Typical Ways of Integration)*; Aihao Xu “城乡居民基本医疗保险制度评价理论与应用研究-以天津市城乡居民基本医疗保险为例” (Tianjin University, 2015) (*Research on Theories and Implementation of the Resident Basic Medical Insurance for Residents - A case study of Basic Medical Insurance for Residents in Tianjin*).

⁴⁶ Statistic from the official website of Beijing Municipal Human Resources and Social Security Bureau, see Notice on the Adjustment of the Benefit of the Endowment Insurance for Residents in 2018 in Beijing, (关于调整 2018 年城乡居民养老保障相关待遇标准的通知), 02 July 2018, available at: http://www.bjrbj.gov.cn/xxgk/zcfg/201807/t20180705_74130.html.

⁴⁷ Statistic from the official website of Beijing Municipal Human Resources and Social Security Bureau, see Notice on the Adjustment of the Benefit of the Endowment Insurance for Retired Employees in 2018 in Beijing(关于北京市 2018 年调整企业退休人员基本养老金的 通知), 28 June 2018, available at: http://www.bjrbj.gov.cn/xxgk/zcjd/201806/t20180629_73930.html.

⁴⁸ The Interpretation of the “Notice on Improving the Benefits of Endowment Insurance for Residents in China in 2018” from the Ministry of Human Resources and Social Security Bureau of the PRC (人社部解读《关于 2018 年提高全国城乡居民基本养老保险基础养老金最低标准的通知》), available at http://www.gov.cn/zhengce/2018-05/14/content_5290931.htm or http://www.gov.cn/xinwen/2017-05/29/content_5197888.htm.

channel to obtain endowment and medical insurance.⁴⁹ Therefore, the analysis of social insurance for domestic workers in this thesis does not cover social insurance for residents. Except where otherwise specifically explained, social insurance means social insurance for workers.

There are two channels for workers to obtain social insurance plans in China: as employees or as flexible employment workers.⁵⁰ Employees are legally entitled to be covered by all social insurance plans; in contrast, the legislation only gives flexible employment workers the right to buy endowment insurance and medical insurance.⁵¹ Employers pay maternity insurance and work-related injury insurance for their employees; and employers and employees pay unemployment insurance jointly.⁵² It means that if workers do not have an employing unit to pay these social insurance plans for them, these workers cannot get access to these plans. As explained in Chapter Two, domestic workers do not have any official employment status. Consequently, they only have the right to buy endowment insurance and medical insurance as flexible employment workers.

Moreover, while domestic workers can buy medical insurance as a flexible employment worker, their internal migrant worker identity undermines their enjoyment of medical insurance. Specific rules regarding the implementation of social insurance are promulgated by local authorities of human resources and social security. Most of these local rules only

⁴⁹ Dong Qi “城乡居民基本养老保险适度水平研究-以安徽省为例” 2014(11) *Journal of Chongqing University of Science and Technology (Social Sciences Edition)* (A Study of the Level of Protection Provided by Social Insurance for Residents in Anhui Province), at 11; Huiyuan Xue and Mihua Xian “城乡居民社会养老保险保障水平评估——基于湖北省 6 个县区的比较分析” 2014 36(6) *Contemporary Economic Management* (Evaluation on the Protection Level of Endowment Insurance for Residents: a Comparative Analysis of Six Counties in Hubei Province), at 6.

⁵⁰ According to the Research Report on Flexible Employment in China, which is published by the Ministry of Labour and Social Security in 2002, the term flexible employment worker is a general term for workers who are different from employees in conventional labour relationship regarding work hours, income, workplace, social insurance or labour relationship. In other words, flexible employment workers are workers who work for a company or different companies at the same time, but have not established a labour relationship with an employing unit.

⁵¹ The Social Insurance Law of the PRC (中华人民共和国社会保险法), 28 October 2010, entered into force 01 July 2011, article 10.

⁵² *Ibid*, article 33 and article 44.

allow workers who have local household registration to buy social insurance as flexible employment workers.⁵³ Although places such as Guangdong province,⁵⁴ Changsha city⁵⁵ and Wuhan city⁵⁶, allow workers who do not have local household registration to buy social insurance as flexible employment workers, these cities usually require workers to provide documents that prove they have worked in these cities for many years. For example, in Guangdong, internal non-employed migrant workers from other provinces are entitled to pay medical insurance as flexible employment workers if they are more than 55 (45 for female workers) and have paid social insurance for more than ten years as employees in Guangdong.⁵⁷ However, it is difficult for migrant domestic workers to meet the requirement because domestic workers do not have a channel to pay social insurance as employees. Consequently, even in places where workers who do not have local household registration are allowed to buy social insurance as flexible employment workers, domestic workers still cannot obtain access.

Limiting the place for buying social insurance would not affect workers enjoyment of medical insurance if it could be used in other cities and provinces without limitations; however, holders need to apply for a permit from the local social insurance authority when they use their medical insurance in other cities. When workers use their medical insurance in other cities without a permit, they need to pay the medical expenses first and then apply for reimbursement from the social insurance authority where they bought their medical insurance. As a result, the holder of medical insurance will need to spend a large amount of time and

⁵³ Wenshu Gao and Mei Gao “城镇灵活就业农民工社会保险问题研究” 2015 54(3) *Journal of Central China Normal University (Humanities and Social Sciences)* (Research on the Social Insurance System for Migrant Workers Engaging in Flexible Employment), at 39.

⁵⁴ Notice on Developing Relevant Regulation on the Participation of Basic Endowment Insurance of Workers in Flexible Employment Relationship (关于完善灵活就业人员参加企业职工基本养老保险有关规定的通知), Department of Human Resources and Social Security of Guangdong province, Department of Finance of Guangdong Province, Guangdong Local Taxation Bureau, 19 April 2016.

⁵⁵ Changsha city lifts the restriction that limits migrant freelance workers to buy endowment insurance and medical insurance in Changsha from 01 May 2016.

⁵⁶ Notice on Improving the Management of Social Insurance (关于加强社会保险公共业务管理的通知), Bureau of Human Resources and Social Security of Wuhan city, 17 April 2014.

⁵⁷ Notice on Developing Relevant Regulation on the Participation of Basic Endowment Insurance of Workers in Flexible Employment Relationship, above n 54.

money to complete the application due to the complex procedures involving the application of the reimbursement of medical expenses and the expenses of transportation between different cities.⁵⁸ Workers may be even unable to obtain a reimbursement due to the complex procedures to obtain all necessary documents for the application for the reimbursement.⁵⁹ In addition, the rate of coverage is also lower than the standard rate if the holder does not have a permit before he or she receives medical treatment. For example, the social insurance authority of Shenzhen city stipulates that when a worker receives medical treatments from social insurance authority designated hospitals in other cities without a permit, the reimbursable amount is 10 per cent less than the normal reimbursable amount.⁶⁰

While such a permit enables workers to use their medical insurance to pay their hospitalisation fees incurred in other cities, it is difficult for migrant domestic workers to obtain all the necessary documents for a permit. Even if they have the permit, they are still unable to use their medical insurance to pay their outpatient services directly.

The policy regarding the scope and rate of coverage of medical expenses incurred when workers use their medical insurance in other cities is issued by local social insurance authorities. Although different cities have different rules regarding the scope of workers who are covered by the mechanism that gives citizens the right to use their medical insurance in other cities, in general, the mechanism covers two groups of people: people who work or live in another cities for a long period of time and people who need to be transferred to a hospital in another city due to inadequate medical resources in local hospitals.⁶¹ To be specific, when internal migrants apply for a permit, they need to provide documents that prove they have stayed or will stay in that city for a long period. Regarding migrant workers, such as domestic

⁵⁸ Bin Zhao “完善医疗保险异地就医管理服务机制研究” 2016(4x) China Labor (Research on the Improvement of the Management of Medical Insurance: the Settlement of Medical Expenses Incurred in other cities).

⁵⁹ Ibid.

⁶⁰ Information from the official website of Shenzhen Government: http://www.sz.gov.cn/ws/jywgz_54509/xzsx/201706/t20170601_6812873.htm.

⁶¹ Jingjing Lan “我国城镇基本医疗保险异地就医政策研究” (Master's thesis, Capital University of Economics and Business, 2017) (Research on the Policy of Using Medical Insurance for Residents to Receive Medical Treatment in Other Cities in China), at 18.

workers, who do not have official employment status, they usually need to provide documents such as residence permit, business license, or real estate ownership certificate, to prove their long term residence in that city.⁶² However, migrant domestic workers are not registered business owners and usually do not own real estate in the place where they work. Therefore, for most domestic workers, a residence permit is the only possible evidence that they can provide.

Nevertheless, even obtaining a residence permit can be difficult for a large number of migrant domestic workers because they are unable to provide the necessary documents for a residence permit application. Local governments stipulate specific rules regarding the issuance of a residence permit. Although there are differences between cities regarding the procedure and the necessary documents, most cities require workers who do not have official employment status to provide documents that prove their long term residence in that city. For example, in Beijing, workers who do not have official employment status need to submit a copy of their property ownership certificate if they live in their own property in Beijing; if they live in a rented property, they need to provide a formal tenancy agreement, a copy of their landlord's national identity card and copy of their landlord's property ownership certificate.⁶³ However, a large number of migrant workers have not signed a formal tenancy agreement with their landlords.⁶⁴ A formal tenancy agreement needs to be registered with a public authority. The registration brings inconvenience to the landlord because the landlord needs to attend the registration along with the tenant.⁶⁵ The registration may also lead to a tax liability of the landlord. The lack of assistance from the landlord contributes to the lack of a formal tenancy agreement for migrant workers.⁶⁶ Even if migrant domestic workers have signed a formal

⁶² Information from the official website of Guangdong public services: <http://www.gdzwfw.gov.cn/portal/guide/11440400698143109W3442100000078#matters-part4>. Similar requirements can be found on the official website of other provincial governments.

⁶³ Information from the official website of the Beijing government: <http://www.beijing.gov.cn/fuwu/bmfw/bmzt/jzz/blzn/t1528031.htm>.

⁶⁴ Rong Yan “推进上海住宅租赁市场发展研究” 2018(3) Scientific Development (Research on Promoting the Development of Housing Rental Market in Shanghai), at 96.

⁶⁵ Ibid, at 96

⁶⁶ Yan, above n 64, at 96.

tenancy agreement with their landlord, landlords do not usually give tenants their identity card and property ownership certificate out of concern for personal information safety and property security. In addition, domestic workers may even not know who the landlord of the property is when they live in subleased properties, not to mention asking the landlord to provide these documents. Consequently, the lack of a residence permit prevents migrant domestic workers from obtaining a permit to use their medical insurance in other cities.

Even if migrant domestic workers overcome all the obstacles mentioned above and obtain the permit to use their medical insurance in the city where they live, they cannot use the medical insurance to pay outpatient services and medicines in that city. While cover for hospitalisation fees can relieve the economic burden of migrant workers when they have severe illnesses, the majority of migrant workers will only need to receive outpatient treatment and buy medicines when they have mild illness.⁶⁷ The lack of coverage for outpatient services thus is linked to the majority of migrant workers in China.

Although some cities and provinces, such as Heilongjiang Province, have issued policy that covers both outpatient and inpatient fees when residents use their medical insurance within the province,⁶⁸ by the end of 2018, most cities in China have not issued policy that enables medical insurance holders to use their medical insurance to pay outpatient services directly in other cities. Although they can apply for the reimbursement of their expenses on outpatient services from the social insurance authorities where their medical insurance is bought, as mentioned above, they may need to spend a large amount of time and money to complete all procedures and obtain all necessary documents for the application. Consequently, the majority of migrant domestic workers cannot benefit from medical insurance even if they have permission to use their medical insurance in another city.

⁶⁷ Zhen Wang and Juan Yan “外出务工人员期待异地就医直接结算的便利” 2018(3) China Social Security (Migrant Workers Wish to Use their Medical Insurance Plan in Other Cities), at 83.

⁶⁸ Notice on the Account Settlement of the Use of Medical Insurance in Heilongjiang Province (关于省内异地就医开展门诊医疗费用直接结算的通知), the Department of the Human Resources and Social Security of Heilongjiang Province, and the Department of Finance of the Heilongjiang Province, 15 May 2018, entered into force 01 October 2018.

C Conclusion

The capability approach provides a suitable theoretical framework to analyse the deficiencies in the legislation applicable to domestic workers in China. The precarious status of domestic workers in China results from not only their inadequate legal protection but also the special characters of domestic work and domestic workers.⁶⁹ The capability approach supports both the goal of providing domestic workers with adequate legal rights but also meets the requirement of understanding their special characteristics.⁷⁰

The analysis of domestic workers' inadequate capabilities in this thesis is based on Nussbaum's list of central capabilities. Such a list of central capabilities improves the normative power of using the capability approach to analyse the deficiencies of legislation. Such a list of central capabilities thus is especially beneficial to the development of legal protection domestic workers in China because their basic legal rights are not guaranteed. This chapter analyses that while adequate income, rest and social security have a close connection with the central capabilities of workers, the current legislation in China does not guarantee a stable and sufficient income for domestic workers to afford the most basic living expenses for themselves and their family members, enough rest to stay healthy, and access to all social insurance plans. The next chapter provides legal reform recommendations to address the problems revealed in this chapter.

⁶⁹ See Chapter 3.

⁷⁰ See Chapter 1.

V Chapter 5 Recommendations for legislation on domestic workers

The analysis in Chapter Four reveals that the insufficient capability of domestic workers results, in part, from their inadequate and their limited access to legal entitlements. Therefore, to improve the capability of domestic workers, China should not only develop legislation to grant adequate legal rights to domestic workers, but also guarantee the practicality of enforcing these rights. To achieve these objectives, this chapter outlines a number of recommendations, which will be developed in three sections. The first section compares the advantages and disadvantages of using three types of law, namely labour law, civil law and specific law, to regulate the relationship between domestic workers and homeowners in China. Based on the comparative analysis between these types of law and their impacts on domestic workers, this thesis argues that China should develop a specific law that is independent of labour protection law and civil law to regulate the relationship between domestic workers and homeowners.

The second section is concerned with the principles underpinning the development of the legislation for domestic workers. It argues that China should develop legislation in accordance with at least two principles: valuing the protection of domestic workers, emphasising the special characteristics of domestic work. China should also use local regulations to supplement the national legislation. The final section considers specific matters relating to domestic workers. This section provides recommendations on how legislation should be developed to guarantee the capability of domestic workers to enjoy their legal rights with regards to three matters: income, rest and social insurance.

A Developing a specific law for domestic workers

This chapter argues that the first step in developing legislation that guarantees the entitlement and enjoyment of the legal rights of domestic workers in China consists of choosing a category of legislation that suits the Chinese national context.

Based on the conclusions of a survey of legislation in more than 60 countries undertaken by Jose Maria Ramirez-Machado,¹ the applicable legislation to regulate the relationship between domestic workers and homeowners can be categorised into three approaches: 1, labour law; 2, civil law and; 3, specific law. In countries, such as Belgium and Chile, where the labour law approach is used, domestic workers are covered by general labour protection law or employment law.² By contrast, in countries, such as Egypt and Japan, which use a civil law approach to regulate the relationship between domestic workers and homeowners, the former is neither covered by labour protection law nor by specific law; they thus fall into the realm of civil law.³ In countries, such as Austria and Brazil, where a specific law approach is used, domestic workers are regulated by a specific law which applies exclusively to them.⁴

Moreover, Dawu Hu, a professor of law from Southwest University of Political Science and Law, claims that there is yet another approach in regulating the relationship between domestic workers and homeowners, which is called the integrated law approach.⁵ Domestic workers in some countries, such as Cambodia, are regulated by both the general labour protection law and civil law.⁶ However, this section argues that such an approach can be categorised either as a labour law approach or as a civil law approach, in accordance with the primary applicable legislation of domestic workers. No matter which category of legislation is used to develop legislation for domestic workers, the applicable legislation in the relationship between domestic workers and homeowners can involve more than one type of legislation. The combination can involve not only labour law and civil law, but it can also include any of two types of legislation. For example, while the relationship between domestic workers and homeowners in China is regulated by civil law, the relationship between them is also regulated

¹ José Maria Ramirez-Machado “Domestic work, conditions of work and employment: A legal perspective” 2003 7 Conditions of Work and Employment Series, at 8-9.

² Ibid, at 8.

³ Ibid.

⁴ Ibid, at 9.

⁵ Dawu Hu 家政工人劳动权益法律保障研究 (China University of Political Science and Law Press, Beijing, 2012) (Research on Labour Protection of Domestic workers), at 370 – 373.

⁶ Ibid, at 370 - 373

by specific legislation, such as the Provisional Regulation on the Domestic Service Industry.⁷ Therefore, this section argues that the typology of law applicable to domestic workers is made up of three types, in accordance with the primary applicable legislation of domestic workers.

While it has been argued that selecting a category of applicable legislation has no influence on the protection of domestic workers,⁸ this section maintains that choosing a suitable category is an essential factor that influences the legal protection of domestic workers. The importance of choosing a category of applicable legislation in terms of the protection of domestic workers is disputed. Williams, Tortell and Callister, for example, argue that there is no evidence showing that domestic workers enjoy better protection under general or specific law.⁹ They conclude therefore that it is unnecessary to use a specific law to protect domestic workers.¹⁰ However, as will be explained hereunder, it would not be accurate to conclude that choosing a suitable category of applicable legislation is unimportant for the development of legal protection for domestic workers.

The protection level for workers depends on many factors, such as the overall legal protection level and the economic development of the society in which they live.¹¹ These factors further influence the protection level of domestic workers. The fact that domestic workers are largely unprotected by legislation, regardless of whether they are regulated by general employment law or special law only, means that the legislation is not effective enough to protect domestic

⁷ The Provisional Regulation on Domestic Service Industry(家庭服务业管理暂行办法)(China), the Ministry of Commerce of PRC, entered into force 1 February 2012.

⁸ Jessie Williams, Lisa Tortell and Paul Callister “The mysterious case of the housemaid: domestic workers in New Zealand law” 2009 2009(4) New Zealand Law Review 10, at 719.

⁹ Ibid, at 718-719.

¹⁰ Ibid.

¹¹ Haijun Dong and Qiang Zhou “农业生产者体面劳动水平及其影响因素——基于株洲石羊塘镇的 567 份调查问卷” 2013(5) Journal of Hunan Agricultural University (Social Sciences) (Factors that Influence the Decent Work of Farmer: Based on the Survey of Shizhen Town of Zhuzhou City) , at 20-22; Qingrui Liu, Yi Shen and Xi Chen “社会保障水平变动规律的跨国实证分析” 2014 20(6) Population&Development (An Empirical Study on the Pattern of the Change of Social Security Level in Different Countries), at 60 -62.

workers. However, it does not prove that choosing a suitable category of applicable legislation is meaningless in terms of developing effective legal protection for these workers.

In addition, the standard of legal protection that is used to evaluate the protection for workers varies from country to country because each country has its own employment protection standards. Although domestic workers are generally unprotected worldwide,¹² their protection standard is not the same in every country.¹³ Therefore, unless countries have a similar social context and use comparable standards to evaluate the legal protection level for domestic workers, it is impossible to evaluate the influence of using a suitable category of applicable legislation in the protection of domestic workers. Consequently, the lack of legal protection means that choosing a suitable type of law to regulate domestic workers cannot guarantee sufficient legal protection for domestic workers, but it also cannot deny the importance of having a suitable type of law that matches the social context around improving legal protection for domestic workers.

The previous chapter explains that, to improve the capability of domestic workers, it is important for China to grant them sufficient legal rights and guarantee their access to these legal rights in practice.¹⁴ A suitable type of law for China thus should not only have to provide domestic workers appropriate legal protection but also that it can be enforced in practice. This section argues that choosing a suitable type of law, at least in China, contributes to the development of effective and practical legal protection for domestic workers. To be specific, it analyses the advantages and disadvantages of applying each type of law to develop legal protections for domestic workers in the Chinese national context. Moreover, it explains the reasons why a specific law for domestic workers would suit the context of Chinese society.

¹² Williams, Tortell and Callister, above n 10.

¹³ Ramirez-Machado, above n 1, at 69.

¹⁴ See chapter 4.

1 Civil law is inadequate to protect domestic workers in China

As introduced in Chapter Two, the relationships between domestic workers and homeowners and the relationships between domestic workers and domestic service companies are regulated by civil law.¹⁵ Civil law is a type of private law, whose fundamental principle involves the autonomy of will.¹⁶ The autonomy of will means that the establishment of responsibilities and rights relies on the free will of both parties.¹⁷ The legislation thus does not give one party more rights than another. Public authorities also do not interfere with the performance of contractual rights and obligations between parties when civil law regulates their relationships. Therefore, when civil law is used to regulate the relationship between domestic workers and homeowners, the rights and obligations of both parties are determined through free negotiation. However, as analysed in Chapter Four, the weaker economic status of domestic workers over their homeowners, and their subordination to the homeowners, contribute to the low bargaining powers of domestic workers.¹⁸ Free negotiation cannot guarantee sufficient legal rights for domestic workers. Civil law thus cannot give domestic workers extra legal protection to balance their weaker status.

Similarly, in accordance with the principle of equality between parties, when disputes arise between two parties, civil law does not protect one party over another one.¹⁹ It means that domestic workers can only use civil disputes resolution procedures to resolve their disputes with homeowners. However, as discussed in Chapter Three, civil litigation procedures cannot guarantee access to justice for domestic workers because of the privacy involving private households, and the insufficient legal rights and low economic power of domestic workers.²⁰ Consequently, using civil law to protect domestic workers cannot give domestic workers adequate legal protection and cannot guarantee their access to justice.

¹⁵ See Chapter 2.

¹⁶ Huixing Liang *民法总论* (3rd ed, Law Press China, Beijing, 2007) (An Overview of the Civil Law of China), 158-159.

¹⁷ Ibid.

¹⁸ See Chapter 4.

¹⁹ See Chapter 4.

²⁰ See Chapter 3.

2 *It is not practicable to include domestic workers to labour protection law*

Using labour protection law to protect domestic workers means including domestic workers in the existing Chinese labour law system or developing new labour law standards for domestic workers within the existing labour law system.²¹ The main advantage of using labour law to protect domestic workers would be the application of the same protection standards between domestic workers and other workers. Supporters of this approach argue that domestic workers should be completely, or at least partly, covered by labour law protection,²² because domestic work in essence is similar to other work.²³ They argue that excluding domestic workers from the protection of the labour protection law violates the principle of equal protection for all workers.²⁴ For example, there is no essential difference between the task of

²¹ Dawu Hu “理念与选择:劳动法如何照耀家政工人” 2011 29(5) Journal of Northwest University of Political Science and Law (Theories and Choices: Illuminate Domestic Workers With Labour Law), at 124; Jing Wei “论我国家政工人劳动权益立法保护模式之选择——基于家政工作的特殊性” 2011 32(5) Journal of Southwest University for Nationalities (Humanities and Social Science) (Legislation on the Protection of Domestic Worker: Based on the Special Characteristics of Domestic Work), at 118; Yi Yang “家政服务法律模式初探——兼论创设标准化家政服务合同之构想” 2011 10(52) Journal of Anhui Vocational College of Police Officers 51 (The Preliminary Research on the Approach of Developing Legal Protection for Domestic Worker), at 52; Binyao Tang “家政工人劳动权益保障问题及立法建议” 2015 25(1) Journal of Jinan University (Social Science Edition) (Study on the Protection of Domestic Workers' Rights and Legal Reform Recommendations), at 61.

²² Xiaoping Sun, Qiang Ren and Jiangyu Wei “家政服务工作的法律属性研究” 2012 29(1) Journal of Shenzhen University (Humanities&Social Sciences) (Domestic Service as a Legal Entity), at 105-107; Tang, above n 21, at 61-62; Yongqian Tu “关于家政工权益保护的法律思考” 2013(8) Journal of Southwest University for Nationalities: Social Science 71 (A Study on the Protection of Domestic Workers' Interests), at 74-75; Juan Liao “从国际劳工组织体面劳动看我国家政工的法律权利与法律地位” 2012 31(6) Journal of Mianyang Normal University (the Legal Right and Legal Status of Domestic Workers: from the Perspective of the Decent Work of the ILO), at 11.

²³ Williams, Tortell and Callister, above n 8, at 721; Chuxian; Zhang Xu, Xiangui “家政工人劳动权益保护之监察” 2011 13(2) Journal of Southwest University of Political Science & Law 17 (Labour Inspection and Labour Protection for Domestic Workers), at 19, Tu, above n 22, at 72-73; Liao, above n 22, at 11.

²⁴ Luyi Hao “家庭工人权利保障问题检视——一种人权普遍性原则与劳动权利保护的竞合方法” 2014 32(11) Hebei Law Science (Review of the Protection For Domestic Workers - An Integrated Approach towards Human Rights Law and Labour Rights Protection); Williams, Tortell and Callister, above n 8, at 721.

domestic workers who cook for homeowners and the task of cooks in restaurants; however, they are treated differently by the current legislation based on where they work.

Although there is no essential difference between domestic work and other work, domestic work has special characteristics, which make labour protection law impractical for these workers.²⁵ The analysis of the practicality of including domestic workers in labour protection law should not only cover the similarities between domestic work and other work, but also take into account the special characteristics of domestic work. In particular, the workplace and the relationship between domestic workers and homeowners differentiate domestic work from other work.²⁶ Analysing the incompatibility between the labour law and the special characteristics of domestic work reveals that it is impractical to use the labour protection law to protect domestic workers.

Firstly, the workplace of domestic work undermines the practicality of using labour law to regulate the relationship between domestic workers and homeowners. Unlike the work that regular employees carry out in the public domain, such as in offices and factories, the private household is the workplace of domestic workers. The privacy arising from working in private households can hinder access to the workplace for labour authorities. For example, mechanisms that require access to the workplace, such as labour inspection, cannot be effectively enforced.²⁷

The workplace of domestic workers also leads to an ambiguous boundary between working hours and rest hours for live-in domestic workers. This ambiguous boundary contributes to the unpredictable working hours of live-in domestic workers. While standard employees

²⁵ Dawu Hu “家政工人休息时间的法治化” 2013(1) Social Science Journal (Legalisation on Working Hours of Domestic Workers), at 62; Wei, above n 21; Minghui Liu “家政服务职业化遭遇瓶颈的根源及出路” 2013 28(3) Journal of Xuzhou Institute of Technology (Social Sciences Edition) (Obstacles that Hinders Professionalism of Domestic Workers and Solution of the Obstacles), at 75-76.

²⁶ Jianfei Li and Juan Shi “论我国劳动法律调整方式从一元化向多元化的转变” 2012 27(2) Journal of Henan Administrative Institute of Politics and Law (Development of the Labour Protection in China: a Transition from a Unitary Approach to a Multi-faceted Approach), at 137; Williams, Tortell and Callister, above n 8, 699-700.

²⁷ See Chapter 3.

usually have fixed working hours and rest hours, the working hours of domestic workers are not fixed, but they are adjusted in accordance with the demand of homeowners from day to day. For example, when the duty of domestic workers is taking care of invalids or infants, they need to be on call at any time. Using fixed working hours such as the standard working hours in the labour law cannot meet the demand of homeowners. Using fixed work hours can also lead to the loss of opportunity for domestic workers to work as live-in domestic workers.

Secondly, the principle of protecting workers under the labour law cannot accommodate the circumstance when homeowners have a low bargaining power than domestic workers. As mentioned above, homeowners are generally the stronger side in the relationship between homeowners and domestic workers due to their higher economic and social status.²⁸ Homeowners thus have better bargaining power than domestic workers. However, the difference in bargaining power between homeowners and domestic workers is not as great as between employing units and employees. Moreover, when homeowners rely on domestic workers to sustain their basic living, the disparity in the bargaining power between domestic workers and homeowners can be further reduced: the latter may even become the weaker party in the relationship.²⁹

Because of the inadequacy of public welfare facilities in China,³⁰ it is common for a household to hire a domestic worker to look after the elderly, children or the disabled in their family so that the householders do not lose their source of income.³¹ It means that suitable domestic workers who have established a stable and trustworthy relationship with homeowners play an important role in maintaining the function of the family. Therefore, when such a domestic worker cannot provide domestic services, it is difficult for the homeowner to find other suitable domestic workers to fill the gap. In particular, when the job of the domestic worker

²⁸ See Chapter 2.

²⁹ Jin Shi “Separate law for domestic workers in China” 2013 2013(3) *Journal of Socialist Theory Guide*, at 99.

³⁰ Jianlan Chen “A Research on the Elderly Supporting Patterns in China: A Survey in Suzhou” (PhD Thesis, Nanjing University, 2012).

³¹ Ruxuan Song “The demand from the domestic service consumer: a market research report of the domestic service industry in Jiangsu Province” 2011 2011(11) *Business Culture* 221, at 222.

involves taking care of infants, it takes a long time for the domestic worker to know the preference of the infants and for infants to accept a new domestic worker. Thus, the homeowners' reliance on domestic workers can increase the bargaining power of domestic workers.

In addition, homeowners may become the weaker party in their relationship with domestic workers if the homeowners are physically or psychologically weaker than their domestic workers, or if they have lower economic power. When homeowners cannot take care of themselves, such as when they are mentally disabled, they are vulnerable to external risks when their guardians are not around. Domestic workers can take advantage of their status when they do not have family members or friends around. Cases involving domestic workers' criminal activities in households are clear evidence of the vulnerability of homeowners.³²

Moreover, due to the inadequate social support for citizens who cannot take care of themselves, there are a significant number of low-income homeowners who have to use their limited income to hire a domestic worker to provide them with day-to-day care.³³ These low-income householders have to rely on domestic workers to carry out their basic daily living activities. For example, some retired citizens have no other option but to share their limited pension with a domestic worker.³⁴ Therefore, assuming that every hirer of domestic workers has advantages over domestic workers and thus protecting all domestic workers with labour laws can lead to the disadvantaged status of homeowners.

³² See Chapter 1.

³³ Xuebin Li “福利多元主义视角下的城市社区养老服务模式研究” (Doctoral Thesis, Nanjing University, 2012) (Research on Urban Community-based Service Models for the Elderly from Perspective of Welfare Pluralism: Take Nanjing City As A Case), at 143-145; Na Zhao “基于供需视角下的我国城镇老年福利服务的现状, 问题与对策研究” (Master's thesis, Capital University of Economics and Business, 2011) (Problems in Social Services for the Elderly and Solutions: from the Perspective of Demand and Supply).

³⁴ Shi, above n 29, at 99; Yangyang Yu and Jin Feng “老年照料的相对报酬: 对“护工荒”的一个解释” 2014 40 *Journal of Finance and Economics* (Low Pay for the Care for the Elderly: An Explanation of Shortage of Caregiver in China).

Since it is impractical to use existing labour law to protect domestic workers, the law will need to be modified, or new rules will need to be developed in the labour protection law if China wants to use labour law to protect domestic workers. However, either the modification of law or development of new law will result in different standards for different workers under the labour protection law.³⁵ Such incoherence is likely to make it difficult to enforce the labour protection law. It is also likely to increase the complexity of labour protection law and the difficulty for people to understand their rights.³⁶ For example, as will be discussed in the third section of this chapter, the working hours stipulated in the labour law cannot meet the irregular working patterns of live-in domestic workers. If China develops a flexible standard on hours of work to accommodate their unpredictable working hours, the lack of a unified standard on hours of work in the labour protection law may result in difficulty for workers to know their legal rights.

In addition, developing a new chapter in the labour protection law for the protection of a special group of workers does not conform to the legal custom of the Chinese Labour Law.³⁷ There is no precedent for using special chapters in the Labour Law or the Labour Contract Law to regulate workers whose work has special characteristics.³⁸ These workers are generally regulated by special legislation.³⁹ In fact, the idea of adding a chapter on domestic workers in the Labour Law was raised by legislators during the process of developing the Labour Law.⁴⁰ However, the idea was rejected due to the risk of damage to the coherence of labour protection law arising from adding a chapter for domestic workers.⁴¹

³⁵ Jingjing Zheng “家事劳动者劳动权益保障之研究” 2005(124) Yuedan Law Sciences (The Labour Protection of Domestic Workers), at 150.

³⁶ Ibid, at 153.

³⁷ Hu, above n 5, at 377.

³⁸ Ibid, at 128.

³⁹ Ibid, at 377.

⁴⁰ Ibid, at 128.

⁴¹ Ibid.

3 *Specific law is practical and effective*

As mentioned above, civil law is unable to address the inadequate legal protection of domestic workers, and using labour law to regulate the relationship between domestic workers and homeowners is impractical. In contrast, this section argues that developing a specific law exclusively for domestic workers can give domestic workers adequate legal protection as well as be enforceable in practice. This is not without risks however. Indeed, as will be discussed, the special law approach may be costly and may lead to legal stigmatisation of domestic workers. Nevertheless, in the Chinese social context, developing a specific law for domestic workers contributes to the increase of their social status. It also does not result in a higher cost than developing adequate legal protection for domestic workers in civil law or labour law. Therefore, developing a specific law that is independent of labour protection law and civil law for domestic workers exclusively is the most suitable measure for the Chinese national context among these three approaches.

(a) Legal protection: a comparison between using specific law and civil law to regulate the relationship between domestic workers and homeowners

A specific law can provide domestic workers with better protection than civil law does. While civil law does not give either party extra legal rights, the rules in the specific law for domestic workers can, thus, be developed in accordance with the actual inequality between domestic workers and homeowners, because developing a specific law for domestic workers does not need to treat domestic workers and homeowners as parties with equal status. Similarly, a specific law for domestic workers does not have to be based within private law. It can thus stipulate the obligations of public authorities regarding the enforcement of legal rights and access to justice for domestic workers. Therefore, compared with civil law, using a specific law to regulate the relationship between domestic workers and homeowners not only gives domestic workers adequate legal rights but also contributes to the effective enforcement of their legal rights.

(b) Practical implications: a comparison between using specific law and labour protection law to protect domestic workers

While the special characteristics of domestic work are detrimental to the practicality of applying labour law to protect domestic workers, a specific law for domestic workers can accommodate the special characteristics of domestic work because it is developed exclusively for the benefits and purpose of domestic workers. Moreover, developing a specific law for domestic workers raises less concern about damage to the coherence of legislation than using labour law to protect domestic workers.

Firstly, using special law enables the development of exclusive rules for domestic workers, which suit the special characteristics of domestic work better than the general rules in the labour law. For example, while it is impractical to use the labour protection law to regulate the flexible working hours of domestic workers, China can develop special rules that accommodate the high flexibility and unpredictability of working hours of domestic workers under the specific law for domestic workers.⁴²

Secondly, using a specific law to protect domestic workers has fewer negative implications for the coherence of the legal system than would be the case for labour protection law. As mentioned above, the vulnerable status of domestic workers and homeowners is double-sided. In order to accommodate the situation when homeowners have a lower bargaining power than domestic workers, the legislation on the protection of domestic workers may thus need to provide lower level protection than the Chinese Labour Law does or even to include rules that ensure the safety of homeowners. These rules may be inconsistent with the principle and the content of protecting employees under Chinese Labour Law. By contrast, although the specific law for domestic workers still needs to conform to the coherence of the Chinese legal system, it does not have to follow the principles and standards of the Chinese Labour Law. This means that while adding new rules for domestic workers to the Chinese Labour Law may lead to incoherence in the labour protection law system, developing new rules in a specific law for domestic workers does not raise such a concern.

⁴² Ibid, at 65-66.

Developing a specific law for domestic workers is also consistent with the legal custom of using specific law to regulate workers who cannot fit into the labour protection law in China. In the Chinese legal system, the protection of specific workers is usually achieved through specific legislation. For example, at the national level, in order to address the prevalent illegal wage deduction and default of migrant construction workers who are not protected by the Chinese labour protection law, the Ministry of Labour and Social Security and the Ministry of Construction promulgated the Provisional Regulation on the Payment of Wages of Internal Migrant Workers from Rural Areas.⁴³ At the provincial level, provinces such as Shanxi, Hebei, and Yunan have issued local regulations on the protection of internal migrant workers from rural areas.⁴⁴ These local regulations have been developed by the provincial government to protect workers who are unable to access the protection of the Chinese Labour Law. Therefore, it is necessary for China to develop a specific law on the protection of domestic workers.

(c) The disadvantages of using a specific law to protect domestic workers in China are not detrimental to its practicality

The last section argued that using a specific law to develop legislation for domestic workers can avoid the impracticality of using labour law and pare against the insufficiency of using civil law to protect the domestic workers. However, using a specific law to protect domestic workers may also lead to the legal stigmatisation of domestic workers and a high legislative

⁴³ Provisional Regulation on the Payment of Wages of Internal Migrant Workers from Rural Areas (建设领域农民工工资支付管理暂行办法)(China), the Ministry of Labour and Social Security and the Ministry of Construction of PRC, entered into force 10 September 2004.

⁴⁴ Measures on Protection of Migrant Workers from Rural Areas of Yunan Province (云南省农民工权益保障办法), Yunan Provincial People's Government, 04 May 2008, entered into force 01 June 2008, available at http://www.yn.gov.cn/yn_zwlanmu/qy/wj/yzf/200807/t20080722_20656.html; the Regulation on Protection of Migrant Workers from Rural Areas of Hebei Province (河北省农民工权益保障条例), the People's Congress Standing Committee of Hebei Province, 27 September 2013, entered into force 01 December 2013, available at http://www.npc.gov.cn/npc/xinwen/dfrd/hb/2013-10/17/content_1809872.htm; the Regulation on Protection of Migrant Workers from Rural Areas of Shanxi Province (山西省农民工权益保护条例), the People's Congress Standing Committee of Shanxi Province, 01 June 2007, entered into force 01 July 2007.

cost. Therefore, it is necessary to analyse if these disadvantages can hinder the practicality of developing a specific law for domestic workers. This part argues that, instead of resulting in the legal stigmatisation of domestic workers, developing a specific law for domestic workers contributes to the improvement of their social status. Moreover, to ensure the practicality of legal protection for domestic workers, the cost of developing a specific law for domestic workers is not higher than the cost of using civil law or labour law. Therefore, developing a specific law to protect domestic workers is the most suitable approach for China to develop legal protections for domestic workers.

Using a specific law to protect domestic workers can increase their social status. When domestic workers are afforded lower level protection than the general labour protection level, whether it is being excluded from the labour protection law or being regulated by special rules, they suffer legal stigmatisation.⁴⁵ In turn, legal stigmatisation may then contribute to the low social status of domestic workers. People may thus think that domestic work is an inferior type of work. Developing a specific law in China will unavoidably result in a different level of legal protection between domestic workers and other workers. As discussed, homeowners may have a lower bargaining power than domestic workers. It is thus unavoidable to adopt a specific law for domestic workers, which has a lower level of protection than the protection level afforded to other workers. Domestic work and domestic workers might, as a result, be stigmatised because of the use of a specific law.

However, although using a specific protection law can lead to a lower protection level for domestic workers than the protection for standard workers, it is debatable whether a lower protection level will inevitably result in the legal stigmatisation and inferior status of domestic workers. Indeed, practical and effective legal protection for domestic workers in China is likely to improve their social status. As discussed in Chapter One and Chapter Two, domestic workers are suffering from low social status in China and the existing legislation plays an important role in this inferior status. Ensuring the capability of domestic workers to obtain appropriate labour protection in practice will only improve their social status.

⁴⁵ Ramirez-Machado, above n 1, at 9.

Therefore, to avoid the legal stigmatisation of domestic workers in China, a balance should be established between the protection level and the practicality of legal protection. This is in contrast to a solution, which would provide domestic workers with legal protection equivalent to standard workers. Using specific legislation to protect domestic workers meets such a balancing requirement. Although using specific law may result in a lower level of legal protection for domestic workers than other workers, the social status of domestic workers would therefore benefit from their enjoyment of legal entitlements in practice.

Another major disadvantage of developing a specific law for domestic workers lies in the high legislative cost.⁴⁶ Unlike using existing labour protection law or civil law to regulate the relationship between domestic workers and households, developing a specific law for domestic workers means the adoption of brand new legislation. Obviously, developing new legislation for these workers will take more time and resources than covering them by existing law. Therefore, researchers such as Wei claim that the long process of developing a special law for domestic workers may make it impossible to meet the urgent need of legislation for the protection of these workers.⁴⁷

It is true that the cost of developing new rules for domestic workers is higher than adapting them to the existing legislation if the practicality and effectiveness of the legislation are not concerned. However, the legislation for domestic workers has to be practical and able to provide domestic workers with sufficient protection; otherwise, the legislation will not improve the precarious status of these workers. Therefore, the practicality and effectiveness of providing domestic workers with appropriate legal protection should be included in the calculation of the cost of using different categories of legislation to protect domestic workers. When these two factors are considered, this section argues that the cost of developing a specific law for domestic workers will be no higher – if not lower – than the cost of using civil law or labour law.

⁴⁶ Wei, above n 21, at 118; Zheng, above n 35, at 150-153; Hu, above n 21, at 131.

⁴⁷ Wei, above n 21, at 118; Hu, above n 21, at 131.

Firstly, as discussed above, although the legislative cost of using civil law to protect domestic workers is low, it is difficult, if not impossible, to use civil law to give domestic workers sufficient legal protection. It means that civil law is not intrinsically a suitable category of legislation that can be used to protect domestic workers.

Secondly, revising the labour law to accommodate the special characteristics of domestic work and to avoid inconsistencies in the labour law can prove to be more time and resources consuming than developing specific legislation for domestic workers. The labour protection law in China is a comprehensive system. Since the adoption of the Chinese Labour Law in 1994, seven labour protection laws, more than ten complementary administrative regulations, and more than 100 ministerial regulations have been adopted at the national level.⁴⁸ To guarantee the practicality of the legislation, it must accommodate the special characteristic of domestic work. Therefore, if China aims to use labour protection laws to protect domestic workers, China needs to revise its labour protection law. The change of content in one law could conflict with legislative principles or specific rules in other laws unless all interrelated law and regulations in the labour protection law are amended accordingly. For example, if the content concerning the holidays and leave of workers is changed in the Chinese Labour Law, its complementary laws and regulations, such as the Regulation on Paid Annual Leave of the Employees⁴⁹ and Special Rules on the Labour Protection of Female Employees⁵⁰, will also need to be amended.

In contrast, using a specific law to protect domestic workers involves less disruption of existing legislation. Although the specific law for domestic workers still needs to be

⁴⁸ Kun Huang and Ma Jing “《勞動法》頒佈二十年來中國勞動立法的成就與展望” 2014(5) China Law (Achievement and Prospect of Labour Protection Laws: 20 Years after the Promulgation of the Labour Law of China), at 23-24.

⁴⁹ Regulations on Paid Annual Leave of Employees (职工帶薪年休假条例)(China), the State Council of PRC, 07 December 2007, entered into force 01 January 2008.

⁵⁰ Special Rules on the Labour Protection of Female Employees (女职工劳动保护特别规定)(China), the State Council of PRC, entered into force 18 April 2012.

compatible with the Chinese legal system, its independence from labour protection law means that the development of new legislation does not affect the consistency of the existing labour protection law. Consequently, developing a specific law on the protection of domestic workers will not require amendment of the complementary laws and regulations of the Chinese Labour Law. Therefore, the legislative cost of developing a specific law for domestic workers is not necessarily higher than the legislative cost of including domestic workers in the Chinese Labour Law.

The discussion above reveals that different categories of legislation have their own advantages and disadvantages in terms of protecting domestic workers. There is no absolute right or wrong in each type of law. The choice of a suitable type of law should be determined in accordance with the social context. In the context of the Chinese legal system, using a specific law to protect domestic workers appears to be more suitable than using Chinese Labour Law or using civil law to protect domestic workers. Nevertheless, choosing a suitable category of legislation to develop legal protections for domestic workers is only the first step in improving the precarious status of domestic workers. The content of the legislation must also address the precarious status of domestic workers effectively. The next section gives recommendations on the fundamental principles of developing legislation for domestic workers in China.

B Principles in the specific law for domestic workers

In order to address factors that are detrimental to the fundamental capabilities of domestic workers, this section argues that the development of legislation should be based on two key principles which include protecting domestic workers and emphasising the special characteristics of domestic work. This section also argues that China should use local legislation to supplement the specific law on the protection of domestic workers. Setting the protection of domestic workers as a key principle corrects the ignorance of legal protection for domestic workers in the legislation applicable to such workers. Emphasising the special characteristics of domestic work contributes to the practicality of legal protection for domestic workers. Moreover, local regulations can govern the relationship between domestic workers

and homeowners before a national law on the protection of domestic workers is adopted and they can supplement the enforcement of the national law after it is adopted.

1 Emphasising the protection of domestic workers

As introduced in Chapter One, adequate legal protection of domestic workers not only improves the disadvantaged status of domestic workers, but also contributes to the improvement of the quality of domestic services and healthy development of the domestic service industry. However, the protection of domestic workers is largely ignored in the legislation applicable to domestic workers. The legislation does not provide adequate legal rights to domestic workers. Even when the legislation gives domestic workers legal rights, it does not give enforceable rules or standards.⁵¹ Consequently, the legal rights of domestic workers are determined through their negotiation with homeowners. The low bargaining power of domestic workers means they cannot usually obtain adequate legal protection.

By contrast, while homeowners are usually the stronger party in the relationship between domestic workers and homeowners, the legislation favours the protection of homeowners. The Provisional Regulation on the Domestic Service Industry stipulates that homeowners are consumers in their relationship with domestic workers.⁵² This means that, when disputes arose between homeowners and domestic workers, the homeowners can claim their rights based on the Law on Protection of Consumer Rights and Interests.⁵³ Consequently, the emphasis on the protection of homeowners in the relationship between domestic workers and homeowners exacerbates the weak status of domestic workers. Therefore, to balance the unequal relationship between domestic workers and homeowners, the legislation should set the protection of domestic workers as a key principle.

⁵¹ See Chapter 4.

⁵² Provisional Regulations on Domestic Service Industry, above n 7, article 3.

⁵³ Law of the PRC on Protection of Consumer Rights and Interests (中华人民共和国消费者权益保护法)(China), 31 October 1993, entered into force 01 January 1994.

2 *Developing legislation in accordance with the special character of domestic work*

As discussed in Chapter Four, in order to change the precarious status of domestic workers, the legislation should not only give domestic workers legal entitlements, but also ensure their capability to enjoy their legal entitlement. The analysis of the conflicts of the labour protection law and the special character of domestic work reflects that, in order to ensure the practicality of the legal protection for domestic workers, it should be developed in accordance with the special character of domestic work. In addition to the abovementioned special characteristics arising from working in or for private households, the development of legislation for domestic workers should also consider the informal and insecure relationship between domestic workers and homeowners.

Firstly, the informal relationship between domestic workers and homeowners often results in the concealed working status of domestic workers. While employers sign a written labour contract with employees⁵⁴ and report the employment relationships to the social insurance authority,⁵⁵ a large proportion of domestic workers have not signed a written contract with homeowners.⁵⁶ Also, even if they have, the contract is not registered by any public authorities. If the relationship is established without the involvement of a domestic service company, their relationship may not be acknowledged by any third party. As a result, the relationship between domestic workers and homeowners is usually in a concealed status. This hidden status means that legislation on the protection of domestic workers can easily be evaded by the homeowners when domestic workers do not claim their rights. Consequently, the development of legal

⁵⁴ Article 10 of the Labour Contract Law of PRC stipulates that a written labour contract shall be signed when a labour relationship is established. Labour Contract Law of the PRC (《中华人民共和国劳动合同法》), 29 June 2007, entered into force 01 January 2008.

⁵⁵ Article 72 of the Labour Law of the PRC stipulates that the employing unit and labourers must participate in social insurance and pay social insurance premiums in accordance with the law. The Labour Law of the PRC (《中华人民共和国劳动法》), 05 July 1994, entered into force 01 January 1995.

Article 4 of the Provisions on the Administration of Declaration and Payment of Social Insurance Premiums (《社会保险费申报缴纳管理规定》), Ministry of Human Resources and Social Security, 26 September 2013, entered into force 01 November 2013.

⁵⁶ See Chapter 3.

protection for domestic workers should accommodate reasonable demands of homeowners and domestic workers.

Secondly, the legislation for domestic workers must accommodate the insecure relationship between domestic workers and homeowners. Unlike the relationship between employees and employing units, domestic workers usually only work for a homeowner for a short period – even for only a few hours. Therefore, while it is important to give domestic workers adequate legal protection, it is important to avoid placing excessive obligations on homeowners. Otherwise, such legislation would not be effectively enforced. For example, as will be analysed in Section Three of this chapter, in order to give domestic workers full access to social insurance plans, the legislation should not stipulate the legal obligation of homeowners to buy social insurance for domestic workers, but allow domestic workers to buy social insurance themselves. Otherwise, the burden arising from paying social insurance for domestic workers may exceed the convenience resulting from hiring domestic workers.

3 Using local legislation to supplement the specific law on the protection of domestic worker

As introduced in Chapter One, China is in urgent need of legislation that provides adequate protection to domestic workers. Local regulations can be used to fill the gap before the adoption of a specific law for domestic workers at the national level. Moreover, the development of national legislation can draw experience from the enforcement of the local regulations. After the adoption of the national law, local regulations can also facilitate the enforcement of the national law with rules that accommodate the local social context.

While developing a special law for domestic workers can provide them with comprehensive legal protection, it also involves a long and sophisticated process, which could take years to

complete.⁵⁷ Such a long process cannot meet the immediate need for legal protection for domestic workers. By contrast, the procedure for developing local regulations is less complicated than developing a national law. In order to ensure the efficiency of developing local regulations, the Legislation Law of China stipulates that provincial, municipal or autonomous regional standing committees of the People's Congress shall approve the local regulations within four months if they do not contradict the Constitution, the laws, the administrative regulations, and the local regulations of their respective provinces or autonomous regions.⁵⁸ In practice, the procedure of adopting a local regulation can be even faster than four months.⁵⁹

Moreover, a local regulation can be developed faster than national law because it only needs to consider local social context, whereas the national legislation needs to consider the development disparity and social context of different provinces and cities. Local regulation can thus be developed faster than the development of national legislation on the protection of domestic workers.

Local regulation will not be able to address all problems facing domestic workers, because it can only stipulate rules regarding the enforcement of higher legal hierarchy legislation and can only be implemented locally.⁶⁰ However, local regulation can at least improve the legal protection for domestic workers by clarifying the legal rights of domestic workers stipulated in the existing legislation. For example, Chapter Four introduced the fact that the lack of

⁵⁷ Dajun Qian and Aichang Xue “繁华与无序: 法律体系建构的中国模式之检讨” 2016(2016 年 01) Science of Law(Journal of Northwest University of Political Science and Law) (Prosperity and Chaos: Review of the Development of Chinese Legal System).

⁵⁸ Article 72 of the Legislation Law of the PRC stipulates that the standing committees of the people's congresses of the provinces or autonomous regions shall examine the legality of local regulations which are submitted for approval, and shall approve them within four months if they do not contradict the Constitution, the laws, the administrative. The Legislation Law of the PRC (中华人民共和国立法法), entered into force 01 July 2007 and amended on 15 March 2015.

⁵⁹ Zhengrong Yang “设区的市地方立法工作研究--以沿海经济欠发达 A 市为例” 2016(2016 年 04) Journal of Guangxi Institute of Socialism (Local Legislation in the City Level: Take the Underdeveloped City A as an Example), at 199-200.

⁶⁰ The Legislation Law of the PRC, above n 58.

enforceable standards regarding daily and monthly rest of domestic workers contributes to their inadequate daily rest and absence of monthly rest.⁶¹ Local regulations can provide specific rules to clarify these legal rights so that domestic workers can obtain some legal rights from local regulations before a national law on the protection of domestic workers is adopted.

The enforcement of local regulations can also provide legal experience to the development of legislation at the national level. In the process of developing national legislation for domestic workers, legislators can avoid problems or can provide corresponding measures to resolve problems that have been revealed in the process of enforcing local regulations.

Even after China has promulgated a law on the protection of domestic workers at the national level, local regulations can supplement the national law by providing standards that accommodate local social context. The disparity in economic development and cultural differences between different provinces and cities means that there are differences regarding the social context of different places.⁶² Therefore, when the social context in one city or province is significantly different, local regulations can add specific rules or new mechanisms to facilitate the enforcement of legal rights of domestic workers which are stipulated in the national law. For example, local regulation could further clarify the punishment for homeowners when they fail to perform their obligations in accordance with its economic development level.

⁶¹ See Chapter 4.

⁶² Lixia Feng “中央与地方立法事权划分的理念, 标准与中国实践——兼析我国央地立法事权法治化的基本思路” 2017(6) Political Science and Law (The Standard and the Theory of Dividing Central and Local Legislative Power and the Practice in China), at 29-32; Xiaofeng Ying “地域文化对区域经济发展的作用机理与效应评价” (Doctoral Thesis, 东北师范大学, 2011) (Action Mechanism and Effect Assessment of Regional Culture to Regional Economic Development: a Case of Northeast Area).

C Recommendations regarding the legislation on income, rest and social security of domestic workers

The last section argues that the development of legislation for domestic workers in China has to follow the principle of protecting these workers and the principle of emphasising the special character of domestic work. Based on these two principles, this section gives recommendations on the amendments needed to address the identified defects in the legislation concerning income, work hours, holidays, and social insurance of domestic workers.

1 Income of domestic workers

Central to the income precariousness of domestic workers is that the existing legislation does not guarantee their capability to obtain sufficient and timely payment of wages.⁶³ Insufficient legal protection on the wages of domestic workers not only leads to a low wage for domestic workers but also contributes to their vulnerability to illegal wage deductions and wage default. In order to guarantee adequate and timely payment for domestic workers, this section recommends that China should at least include wages of domestic workers to the protection of the minimum wage, develop mechanisms to prevent illegal wage default and deduction by homeowners, and develop standards for paying overtime wages to domestic workers.

(a) Covering domestic workers regarding the protection of the minimum wage

Providing domestic workers with a minimum wage can not only ensure an income that covers basic daily expenses for them, but also contributes to an adequate payment for their overtime work. It is also practical because it will not lead to a substantial increase in the cost of hiring domestic workers, but at the same time protects domestic workers from exploitative wages.

⁶³ See Chapter 3.

The institution of a minimum wage is used by most countries around the world to regulate their labour market and to guarantee that workers are able to obtain a remuneration that is sufficient to cover the most basic living expenses of themselves and their family members.⁶⁴ The current minimum wage mechanism in China was adopted in 2003.⁶⁵ The adoption of the Minimum Wages Regulation in 2003 marks the start of the current minimum wage mechanism.⁶⁶ The regulation requires that the wage of all employees must not be lower than the minimum wage stipulated by provincial or municipal governments.⁶⁷ The institution of the minimum wage in China has been developed to achieve macro-control, to improve the fairness of income distribution, and to give workers and their dependents the legal right to obtain wages that enable them to cover basic living expenses.⁶⁸

In order to cover the most basic living expenses of domestic workers and their dependent family members, the legislation should provide domestic workers with the minimum wage. The minimum wage will benefit two types of domestic workers in particular. The first type is those domestic workers who receive a monthly or hourly wage that is lower than the minimum wage. The second type is those domestic workers whose total monthly wage is higher than the minimum wage, but whose overtime hours are not sufficiently remunerated in accordance with the standard of the minimum wage.

For the first type of domestic workers, the consequence of being covered for the minimum wage is direct. Their increased wage means they can at least obtain an income that covers

⁶⁴ Patricia Jones “The impact of minimum wage legislation in developing countries where coverage is incomplete” 1997, at 1.

⁶⁵ Yong Xie and Liyan Wang “中国的最低工资标准:发展、构成和水平” 2015 No.181(6) Research on Development (The Development, Constitution and Level of the Minimum Wage in China), at 144.

⁶⁶ Ibid.

⁶⁷ The Regulation on Minimum Wage (最低工资规定)(China), the Ministry of Labour and Social Security, 20 January 2004, entered into force 01 March 2004.

⁶⁸ Qilong Zhang “论社会主义市场经济条件下最低工资保障制度的进一步完善” 2006(6) Journal of Harbin University of Commerce (Social Science Edition) (Improvement of the Minimum Wage Mechanism in the Socialist Market Economy), at 116; Liang Yang “从贫富差距看我国最低工资标准制度” 2012 28(5) Reformation&Strategy (The Institution of the Minimum Wage in China: from the Perspective of the Income Disparity), at 193-194.

their basic living expenses. For the second type of domestic workers, being protected by the minimum wage contributes to a sufficient payment for their overtime work. Although the total monthly wage of these domestic workers is already higher than the minimum wage, they are actually underpaid by the homeowners because their longer working hours are not paid separately over and above the minimum wage. It means that if their overtime was paid separately from the minimum wage, their total monthly wages could be higher than their current wage.

If we look at the wages of domestic workers in Shenzhen city as an example: the minimum wage of full-time workers⁶⁹ in Shenzhen in 2017 was 2,130 yuan per month.⁷⁰ The standard working hours are eight hours per day and the average number of working days is 20.83 days per month.⁷¹ This means that the minimum hourly wage of full-time workers was approximately 12.78 yuan. However, the daily working hours of full-time domestic workers are generally more than eight hours.⁷² If a domestic worker works 10 hours per day, which is common among domestic workers,⁷³ his or her monthly minimum wage would be at least 2662 yuan if their wages were calculated by using the minimum wage standard. Consequently, if the homeowner pays this full-time domestic worker a monthly minimum wage, the homeowner has actually underpaid the domestic worker if the minimum wage standard is used to calculate the wage. Therefore, covering domestic workers for the protection of the minimum wage is in line with the protection of domestic workers because it can not only give them an income that covers their basic living expenses, but it can also compensate for the neglect of the overtime wage of those domestic workers.

⁶⁹ The minimum wage in China consists of a monthly minimum wage and an hourly minimum wage. The monthly minimum wage applies to full-time workers and the hourly minimum wage applies to part-time workers.

⁷⁰ Notice of the adjustment of the minimum wage of Shenzhen city (深圳市人力资源和社会保障局关于调整本市最低工资标准的通知), the Bureau of Human Resource and Social Security of Shenzhen City, 01 April 2017, available at: http://www.sz.gov.cn/zfgb/2017/gb1000/201704/t20170410_6123440.htm.

⁷¹ Notice of the Calculation of the Average Monthly Wage of Employees (关于职工全年月平均工作时间和工资折算问题的通知), the Ministry of Labour Protection and Social Security of the PRC, 03 January 2008.

⁷² See Chapter 3.

⁷³ See Chapter 3.

While covering domestic workers for the protection of the minimum wage contributes to the wage increase of some domestic workers, it is practical because it will not lead to an unaffordable increase in cost for the homeowners. The main obstacle in covering workers for the protection of the minimum wage in China is that an inappropriate high minimum wage standard may lead to the increase of labour costs, which can be detrimental to the employment of workers, especially workers who have limited occupational skills.⁷⁴ As discussed in Chapter Two, the majority of domestic workers are not highly skilled workers.⁷⁵ A large proportion of them chooses to engage in this sector because they lack other skills that enable them to obtain jobs that give them a similar level of income in factories or offices.⁷⁶ Therefore, including domestic workers in the protection of the minimum wage may lead to unemployment among domestic workers due to their overall low skills level. However, this thesis argues that covering domestic workers for the minimum wage is unlikely to affect the employment of the majority because the wage of most domestic workers in China is higher than the minimum wage.

As introduced in Chapter Three, China has a low minimum wage to the average wage ratio.⁷⁷ Consequently, even where domestic workers generally have a low wage, the majority of domestic workers have a higher wage than the minimum wage. According to a survey conducted by the Shanghai Home Service Industry Association in 2018, the wage of domestic workers in the lowest category was 3,513 yuan while the minimum wage in Shanghai was

⁷⁴ Xiaochun Li and Ping He “最低工资线的农民工就业效应——以长三角地区为例” 2010(4) *Jiangsu Social Sciences* (Relationship between the Minimum Wage and the Employment of Migrant Workers: Take the Yangtze River Delta Region as An Example), at 65; Shiwei Zhang and Zhengxiong Yang “最低工资标准提升是否影响农民工就业与工资” 2016(10) *Finance & Economics* (Does the increase of the minimum wage improve the employment and wages of migrant workers), at 108.

⁷⁵ See Chapter 2.

⁷⁶ Lin Zhang and Yi Yang “人口新常态背景下农村家政女工生存与发展现状调研——基于北京、广州、武汉、西安的样本分析” 2016(5) *Hubei Social Sciences* (An Survey of the Living Condition of Migrant Domestic Workers from Rural Areas in the Context of the Population New Normal), at 53; Yongkui Luan, Shengnan Huang and Zhigang Wang “家政服务人员的从业现状, 存在问题及解决对策研究——基于北京和河北的调查分析” 2012(06S) *China Collective Economy* (Research on Employment Situation of Domestic workers and Solutions for Problems Facing Domestic Workers: Based on a Survey of Domestic Workers in Beijing and Hebei Province), at 159.

⁷⁷ See Chapter 3.

2,420 yuan, which was the highest minimum wage in China at the time.⁷⁸ The low minimum wage standard also means that, even if there are still domestic workers whose wages are lower than the minimum wage, the gap between their wage and the minimum wage remains marginal. Therefore, requiring domestic workers to be paid at the level of the minimum wage will not lead to a substantial increase in the labour cost of hiring domestic workers; rather it will correct the exploitative basic wage and the neglect of the overtime wage of domestic workers.

(b) Developing mechanisms to prevent illegal wage default and deduction

Domestic workers are vulnerable to illegal wage deductions and default; however, the current legislation does not provide effective preventative measures.⁷⁹ Domestic workers also do not have adequate access to justice when they face these circumstances.⁸⁰ The close relationship between domestic workers and homeowners arising from working in private households further contributes to the payment of wages in kind. This can be carried out by homeowners as a concealed way to deduct from the wages of domestic workers. Consequently, domestic workers are even more vulnerable to illegal wage default and deduction than other workers.

This section argues that in order to address the prevalence of illegal wage deductions and default among domestic workers, China needs to include at least three measures in the national law on the protection of domestic workers. These include the following: paying the wages of domestic workers by legal tender; imposing economic penalties on homeowners if they fail to pay the wages of domestic workers in full and on time; giving a payslip to domestic workers when homeowners pay their wages. Although these measures are not guaranteed solutions against illegal wage default and deduction faced by domestic workers, they will counteract common factors that contribute to illegal wage default and deductions. These factors include

⁷⁸ The result of the survey of wages of domestic workers in the third quarter of 2018, Shanghai Home Service Industry Association, Bureau of Human Resources and Social Security, see <http://www.shhsia.com.cn/info.html?id=20181023>.

⁷⁹ See Chapter 4.

⁸⁰ See Chapter 4.

lack of punishment to deter illegal wage default and deductions, payment-in-kind wages, and the difficulty for domestic workers to collect evidence.

Firstly, developing a standard of financial penalties to punish illegal deduction or default in the wages of domestic workers can deter homeowners from deducting from or defaulting on the wage of domestic workers illegally. As discussed in Chapter Four, the lack of penalties for homeowners who default on or deduct from the wage of domestic workers illegally contributes to the vulnerability of domestic workers to such acts. Therefore, in order to address the income precariousness of domestic workers, the legislation should set appropriate penalties to deter such acts. It can give domestic workers the right to claim financial compensation from homeowners when the latter do not pay their wages in full and on time.

The penalties for homeowners should also take into account the fact that the economic status of homeowners is lower than the economic status of companies. The Labour Contract Law stipulates that when employers fail to pay workers their labour remuneration on time and in full, as stipulated in the labour contract or as prescribed by the State, the labour administrative authorities shall order the employer to pay additional compensation to the worker at a rate of not less than 50 percent but not more than 100 percent of the amount payable.⁸¹ However, homeowners do not have the same economic power as a company. In order to avoid excessive financial burden on homeowners, China could consider a lower level of punishment for homeowners than the penalties stipulated in the Labour Contract Law.

Secondly, in order to protect domestic workers from income loss arising from excessive payment of wages in kind, China should stipulate that homeowners should pay the wages of domestic workers by legal tender, namely the official currency of China.⁸² In order to ensure sufficient payment of wages of employees and to forbid employers using payment in kind, such as negotiable securities, the Provisional Regulation on the Payment of Wages stipulates

⁸¹ Labour Contract Law of the PRC, above n 54, article 85.

⁸² Renminbi (RMB) is the only official currency in China. See Article 3 of the Regulations of the People's Republic of China on the Administration of RMB (中华人民共和国人民币管理条例), amended on the 19 March 2017.

that wages shall be paid by legal tender.⁸³ Domestic workers are also vulnerable to excessive payment in kind. The close connection between the daily life of live-in domestic workers and the daily life of homeowners leads to the use of basic commodities such as food, accommodation and clothing to pay the wages of domestic workers.⁸⁴ The latter may also be forced to accept payment in kind under pressure of retaining their jobs.⁸⁵

Paying domestic workers in kind has the potential to infringe the wage rights of domestic workers, especially when in-kind payment is imposed or when the monetary value of the in-kind payment is excessive.⁸⁶ Homeowners may even use payment in kind as a concealed measure to deduct from the wages of domestic workers due to the difficulty of calculating the value of the items that are used to pay the workers. Therefore, to protect domestic workers from abusive in-kind payments, the legislation for domestic workers should only allow the use of legal tender to pay their wages.

Moreover, the prohibition of payment in kind can largely address the poor living and working conditions of domestic workers. Taking the accommodation and food of live-in domestic workers as an example, these are usually provided by householders nominally free of charge,⁸⁷ whereas live-in domestic workers usually need to work long hours or even to be on call around

⁸³ The Provisional Regulation on the Payment of Wages (工资支付暂行规定)(China), the Ministry of Labour, 06 December 1994, entered into force 01 May 1994.

⁸⁴ Dzodzi Tsikata “Employment agencies and the regulation of domestic workers in Ghana: institutionalizing informality?” 2011 23(1) Canadian Journal of Women and the Law, at 216

⁸⁵ Audrey Macklin “Foreign domestic worker: Surrogate housewife or mail order servant” 1991 37 McGill LJ, at 718-719.

⁸⁶ ILO *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection* (ILO, Geneva, 2013)2, Page 81.

⁸⁷ Shanshan Chang “沈阳市家政服务业发展现状与对策研究” (Master's Thesis, Shenyang University, 2011) (A Research on the Current Situation and Counterplan of Domestic Service of Shenyang City), at 41; Jian Nong “南宁家政服务市场 2016 年前三季度供求情况分析” 2016(11) RenShiTianDi (Analysis of the Demand and Supply of the Domestic Service Industry in the First Three Quarters in Nanning City), at 39.

the clock.⁸⁸ It means that homeowners actually use accommodation and food as a means to impose long work hours on domestic workers.

However, it is common to see that domestic workers have to accept a poor standard of food or accommodation.⁸⁹ Householders may require domestic workers to eat at a separate table, with low-quality meals, or even with left-over food, or they may provide poor accommodation, such as sleeping on a couch or on the floor.⁹⁰ Domestic workers are unlikely to demand the provision of decent food and accommodation because homeowners provide these things free of charge. Such conditions not only mean a poor standard of living for domestic workers, but also harm their dignity.

If the legislation prohibits in-kind payment, then the provision of accommodation and food will not be considered free of charge, but as separate purchase contracts between domestic workers and households. Consequently, householders cannot use nominally free items as excuses to provide poor quality accommodation or food to domestic workers. The latter is also more likely to demand homeowners to provide decent accommodation and food because homeowners have to provide domestic workers with food and accommodation in line with what domestic workers have paid for.

Thirdly, China should stipulate the legal obligation of homeowners to provide domestic workers with payslips when paying wages to domestic workers. Stipulating such a legal obligation of homeowners ensures correct payment of the wages of domestic workers. It enables the workers to check if their wages are sufficiently paid by householders. As will be recommended in the next part, China should develop an overtime rate for domestic workers. A payslip that specifies the components of the wage of domestic workers enables them to

⁸⁸ Dan Ma “北京市住家家政工的劳动过程分析 ” 2015(2) Chinese Workers (Analysis of the Work Procedure of Live-in Domestic Workers in Beijing), at 20; Wei, above n 21, at 116.

⁸⁹ Liu Minghui *Migrants and cities research report on recruitment, employment, and working conditions of domestic workers in China* (International Labour Organization, 2017), at 62-63.

⁹⁰ Ibid.

verify if the homeowners have calculated and paid their overtime work correctly. Homeowners are thus less likely to ignore the overtime wages of domestic workers.

Domestic workers can also use the payslips as evidence to prove the existence of a domestic service relationship. As discussed in Chapter Three, the lack of a written contract and the difficulty for domestic workers to collect evidence results in their difficulty to prove the existence of a domestic service relationship with the established rights and obligations between domestic workers and homeowners.⁹¹ Domestic workers can not only use the payslip to prove their domestic service relationship with homeowners, but they can also use it to support their legal claims concerning their wages. For example, domestic workers can present a payslip to court as evidence to prove the continuity of their domestic service relationship with the householders, or as evidence to calculate their average monthly income.

(c) Developing an overtime wage rate for domestic workers

As discussed in Chapter Four, low income of domestic workers not only contributes to a poor standard of living, but it also leads to longer working hours. Developing an overtime wage rate for domestic workers will contribute to an income increase for a large proportion of domestic workers. In order to ensure the practicality of enforcing the overtime rate for domestic workers, this rate could be lower than the standard stipulated in the Labour Law.

Inadequate legislation on the protection of wages for domestic workers means that all rights and obligations regarding their wages are determined by free negotiation between homeowners and domestic workers.⁹² Consequently, the wages of domestic workers are usually fixed, regardless of their working hours.⁹³ Homeowners thus do not pay them overtime wages at a higher rate than the rate of the normal wage nor even pay the overtime work of domestic workers at all. Such an arrangement can be favourable to domestic workers when a full-time domestic worker has short working hours. For example, when a live-in

⁹¹ See Chapter 3.

⁹² See Chapter 2.

⁹³ Tang, above n 21, at 58-59.

domestic worker is paid at the rate of a full-time worker, but only needs to spend a few hours to complete the housework and cook food for the homeowner, a fixed wage regardless of the working hours is favourable to this domestic worker.

However, live-in domestic workers are usually on call around the clock, and a large proportion of them work more than 10 hours per day.⁹⁴ Consequently, the working hours of a large proportion of them are significantly longer than the regular daily working hours stipulated in the Labour Law for employees.⁹⁵ This means that, although long working hours of domestic workers can augment their income, the lack of a clear standard to calculate their overtime wages can lead to underpayment overall. Therefore, setting an overtime rate for the wages of domestic workers contributes to the correction of such an underpayment.

While setting an overtime wage rate for domestic workers can improve their income, the development of an overtime wage standard also needs to consider the fact that the economic power of households is generally not as strong as the economic power of companies and that hiring domestic workers also does not bring direct profit to households.⁹⁶ Households may even have weaker economic power than domestic workers.⁹⁷ Therefore, using the standard for regulating company employees to regulate domestic workers may contribute to a reversed inequality between domestic workers and householders. In addition, an inappropriately high overtime rate might not be effectively enforced. When the overtime rate is too high for homeowners to afford, they can hire more than one domestic worker to avoid paying overtime wages, even if it will lead to extra inconvenience for homeowners. For these reasons, this thesis argues that the standard could be lower than the standard stipulated in the Labour Law.

⁹⁴ Ma, above n 88; Zhuqing Wang “家政工劳动权益保护立法的必要性研究” 2010 26(1) Journal of University of Science and Technology Beijing (Social Sciences Edition) (The Necessity of Developing Legal Protection for Domestic Workers); Ruijie Wang “上海市家庭服务业现状分析与规范化建设” 2011(5) Scientific development (Analysis of the Current Situation of the Domestic Service Industry and Its Standardisation).

⁹⁵ Article 36 of the Labour Law of the PRC stipulates that the State shall practise a working hour system wherein labourers shall work for no more than eight hours a day and no more than 44 hours a week on the average.

⁹⁶ See Chapter 2.

⁹⁷ See the second section of Chapter 5.

2 *Working hours and holidays of domestic workers*

While adequate rest is essential to the central capabilities of domestic workers, legislation applicable to domestic workers does not ensure even the most basic rest periods. As a result, domestic workers are vulnerable to excessively long working hours. To improve the precarious status of domestic workers, this section argues that China should develop legislation to ensure the capability of domestic workers to obtain adequate rest periods. It means that China should give domestic workers adequate legal rights and guarantee the enforcement of these rights. Unlike conventional jobs, domestic work is characterised by irregular and unpredictable working hours.⁹⁸ Therefore, to ensure the practicality of enforcing the legislation, the legislation on the working hour and holidays of domestic workers must accommodate such characteristics of the domestic work.

This section provides legal reform recommendations on the daily rest, weekly days off, days off on national holidays, and paid annual leave for domestic workers. Although having the capability of obtaining rights on these aspects do not necessarily mean adequate rest periods for domestic workers, the capability to access these rights ensures the most basic rest periods for domestic workers. Moreover, the recommendations on these aspects demonstrate how legislation should be developed to accommodate the irregular working patterns of domestic work.

(a) Setting a minimum daily rest period for domestic workers

Domestic workers are vulnerable to excessively long working hours because their daily working hours are usually unilaterally decided by homeowners.⁹⁹ Live-in domestic workers are even more vulnerable to excessively long working hours due to the overlap between their work and daily life.¹⁰⁰ This section argues that China should give domestic workers the right

⁹⁸ See the first section of Chapter 5.

⁹⁹ Sun, Ren and Wei, above n 22, at 103.

¹⁰⁰ Dawu Hu “住家家政工人与雇主在住宅隐私权上的冲突及其协调 ” 2012(4) *Studies in Law and Business* (Conflict and Coordination: the Privacy of Live-in Domestic Workers and Homeowners), at 77 -78.

to have a minimum consecutive daily rest period. Such an approach can ensure the most basic daily rest period of domestic workers. Moreover, setting a minimum continuous rest period is practical because it accommodates the market demand for long working hours of domestic workers as well as the preference of some domestic workers for long working hours. Although such an approach does not give domestic workers as much rest as the Chinese Labour Law does, it avoids impracticalities arising from using the standard regarding daily rest in the Chinese Labour Law to protect domestic workers.

A minimum rest period ensures the most basic daily rest hours of domestic workers

The biological characteristics of human beings determine that people need a period of continuous sleep every day. When workers do not have sufficient uninterrupted sleep, their health condition and productivity can be affected negatively.¹⁰¹ A large proportion of live-in domestic workers in China also consider that the inadequate consecutive rest period has the most significant negative impact on their working condition.¹⁰² Therefore, China should ensure adequate continuous daily rest hours in the legislation for domestic workers.

Unlike other more regular forms of work, which has a relatively clear boundary between working and non-working periods, the boundaries in domestic work are usually ambiguous and changeable on a daily basis. Live-in domestic workers, in particular, do not have clear boundaries between working hours and rest hours because they work and live in the same place and need to be on call around the clock. The lack of clear boundaries between working hours and rest hours in domestic work determines that applying the eight or 11 working hours limitation stipulated in the Chinese Labour Law cannot guarantee the most basic continuous rest hours for domestic workers.

¹⁰¹ Terry Young and others “Sleep disordered breathing and mortality: eighteen-year follow-up of the Wisconsin sleep cohort” 2008 31(8) Sleep.

¹⁰² Minghui Liu “家政工获得劳动保障权利的障碍及路径” 2011 32(5) Journal of Southwest Minzu University (Humanities and Social Science) (Channel and Obstacle for Domestic Workers to Obtain Labour Protection), at 123

According to the Chinese Labour Law, a standard working day consists of eight hours on average with a maximum of 11 working hours in a day.¹⁰³ However, the lack of a clear boundary means that the working hours of domestic workers can be split into a number of short periods. Consequently, the total working hours of domestic workers may be less than 11, but they cannot have long consecutive rest periods. Such circumstances are common among live-in domestic workers. When their work is to take care of people who cannot look after themselves, they may be asked by the homeowner to work every two to three hours.¹⁰⁴ Therefore, even if they are allowed to take a rest during these intervals and the total daily working hours are less than 11 hours, they may still be unable to have a long continuous rest period. By contrast, while setting a minimum daily rest period does not give domestic workers as long a total rest period as the Chinese Labour Law prescribes, it gives domestic workers the right to have adequate daily consecutive rest hours. Therefore, to ensure the most basic continuous daily rest period of domestic workers, China needs to set a minimum daily rest period in the national law for domestic workers.

A minimum rest period accommodates the irregular working pattern of domestic work and the preference of domestic workers

The concealed and isolated status of domestic workers means that, if legislation does not meet the market demand for domestic workers and preference of domestic workers, it can easily be avoided by homeowners or domestic workers.¹⁰⁵ Different households can have different demands for domestic services. For example, while some homeowners need a part-time domestic worker to cook meals, some homeowners need a live-in domestic worker to look after the elderly in their family day and night. The variety of demands from homeowners contributes to the irregular working pattern of domestic workers. Setting a minimum daily

¹⁰³ The Labour Law of the PRC, above n 55, article 41. The employing unit may extend working hours as necessitated by its production or business operation after consultation with the trade union and labourers, but the extended working hour per day shall generally not exceed one hour; if such extension is needed for special reasons, under the condition that the health of labourers is guaranteed, the extended hours shall not exceed three hours per day. However, the total extension in a month shall not exceed thirty-six hours.

¹⁰⁴ Ma, above n 88, at 22.

¹⁰⁵ See section 2 of Chapter 5.

consecutive rest period allows the broadest freedom for homeowners and domestic workers to decide the working pattern of domestic work, while at the same time ensures the most basic rest period of domestic workers. It thus can, to the largest extent, accommodate the irregular working pattern of domestic work.

Similarly, it also accommodates a variety of preference regarding working hours among domestic workers. Domestic workers also have different preferences regarding their working pattern. Some domestic workers prefer long working hours because long working hours bring them a high income and domestic work usually has long standby hours.¹⁰⁶ The types of domestic workers who enjoy a high income usually work long hours. For example, according to a survey conducted by the Shanghai Home Service Industry Association in the first quarter of 2018, confinement nannies¹⁰⁷ had the highest income among domestic workers in Shanghai.¹⁰⁸ The average wage of five per cent to 10 per cent of confinement nannies was 10,600 yuan; the average wage of 60 per cent to 75 per cent of confinement nannies was 8,633 yuan, and the average wage of 20 per cent to 30 per cent of confinement nannies was 6,600 yuan.¹⁰⁹ In contrast, the average wage of full-time live-out domestic workers in Shanghai is substantially lower than the wage of confinement nannies. The average wages of five per cent to 10 per cent, 60 per cent to 75 per cent and 20 per cent to 30 per cent of full-time live-out domestic workers were 6767, 4480 and 3500 yuan respectively.¹¹⁰ The high income of a confinement nanny is not only the result of their experience and occupational skills of taking

¹⁰⁶ Yufei Wei “女性农民工从事家政服务的就业机制研究” (Master's thesis, Sichuan Academy of Social Sciences, 2014) (Research on Female Migrant Workers in the Domestic Service Industry), at 20-22.

¹⁰⁷ Confinement nannies are domestic workers who provide care to new mothers and infants usually in the first month after the birth of infants. according to Chinese tradition, the first month after a woman gives birth is an essential period for the health of the new mothers because a bad recovery may affect her health for the rest of her life. See Ruyan Li and Hongyan Wang “月嫂陪护对母婴健康的影响” 2010 27(27) Chinese Journal of Practical Nursing (The Influence of Confinement Nannies on New Mothers and Infants), at 42-43; Fengmei Yuan, Ayiguli and Yali Dai “乌鲁木齐市月嫂管理现状对产妇健康影响研究” 2012 42(4) Xinjiang Medical Journal (Management of Confinement Nanny and the Health Condition of New Mothers in Urumchi), at 119.

¹⁰⁸ Result of the Survey on Wage of Domestic Workers, Bureau of Human Resource and Social Security of Shanghai City, Shanghai Home Service Industry Association, <http://www.shhsia.com.cn>.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

care of new mothers and infants, but also of their long working hours.¹¹¹ Confinement nannies usually only have the opportunity to rest when the infant of the homeowner is sleeping. Even when the infant is sleeping, confinement nannies may need to provide care and prepare meals for the new mothers.

Moreover, the long on-call hours of domestic work is another reason why domestic workers may be willing to accept long working hour jobs. While the overall working hours of domestic work can be long, these working hours usually consist of long standby periods.¹¹² Although a standby period is not the same as a rest period, the intensity of work in these periods is generally lower than the intensity of normal working hours.¹¹³ Standby hours can thus give domestic workers the chance to recover their energy. Therefore, the longer working time of domestic work is arguably not necessarily unacceptably arduous. Consequently, domestic workers may be willing to work longer hours for higher wages.

By contrast, although limiting the working hours of domestic workers to 11 hours per day¹¹⁴ can theoretically give them a longer rest period than setting a minimum continuous rest period does, such a limit would not be effectively enforced because it does not meet either the demand of homeowners or domestic workers. For example, as mentioned above, confinement nannies work longer than 11 hours per day. If China limited their daily working hours to 11 hours, confinement nannies would not have enough time to provide adequate care to new mothers and infants. Consequently, homeowners would need to hire another domestic worker if they cannot assume part of the tasks of domestic workers. Such a result is not desired by homeowners due to the difficulty of finding suitable confinement nanny. In addition to the occupational skills, confinement nannies need also need to match the personality of

¹¹¹ Jiali Kou “家政行业亟需标准化” 2016(32) *Economy&Law* (Domestic Service Industry in China is in Urgent Need of Standardisation), at 64-65.

¹¹² Liao, above n 22, at 11; Tang, above n 21, at 61.

¹¹³ Guoping Sun “劳动法上待命时间争议的认定” 2012(5) *Law Sciences* (Nature of the On-Call Hour in Labour Law), at 47.

¹¹⁴ 11 hours is the longest working hours allowed by the Chinese Labour Law.

homeowners.¹¹⁵ Homeowners may also worry about the inconsistency of care which may result from having more than one confinement nanny. The reduced working hours would also lead to a reduced wage for these domestic workers. As a result, domestic workers and homeowners might avoid such a limitation. Therefore, although setting a minimum rest period does not give domestic workers the equivalent rest period as the Chinese Labour Law does, it is practical because it contributes to a balance between the protection of domestic workers and the demands of homeowners and domestic workers.

(b) Giving domestic workers the right to have one day off per week

As discussed in Chapter Four, the legislation does not ensure the right of domestic workers to have a weekly day of rest. Although some domestic workers obtain such a right through negotiation with homeowners, others may be unable to do so due to their low bargaining power. In order to give domestic workers the capability to enjoy days off on a regular basis, this section argues that legislation should give domestic workers at least one day off per week. However, the legislation should also consider the variety of working patterns of domestic work. It should thus allow homeowners and domestic workers to replace the weekly day of rest with a two-day rest fortnightly or up to a four-day rest monthly.

Stipulating the legal right of domestic workers to have a day off every week can protect domestic workers who cannot obtain a weekly day off due to their low bargaining power. Regular daily rest is important to the health, personal development, and work-life balance of workers.¹¹⁶ According to the Chinese Labour Law, the minimum weekly rest period is one day.¹¹⁷ A critical reason for developing a minimum weekly rest is to protect workers from being forced to work without a regular rest due to the unequal economic status between

¹¹⁵ Yihui Su “控制与抵抗:雇主与家政工在家务劳动过程中的博弈” 2011 31(6) Chinese Journal of Sociology (Control and Resistance: The Dynamics between Employers and Domestic Workers in the Labour Process of Domestic Work)105.

¹¹⁶ See Chapter 4.

¹¹⁷ The Labour Law of the PRC, above n 55, article 38.

employees and employers.¹¹⁸ Similarly, in the relationship between domestic workers and homeowners, domestic workers may also be unable to obtain a weekly rest due to their lower economic status than homeowners. Therefore, giving the domestic worker the right to have one day off every week contributes to balancing the unequal status between domestic workers and homeowners.

In addition, to ensure the practicality of the legislation, it needs to accommodate the characteristic of continuity of domestic work. The close connection between domestic work and the operation of a household means that homeowners may need continuous domestic service from domestic workers. Taking confinement nannies as an example, a competent confinement nanny knows how to solve common problems facing infants and thus ensure their healthy growth.¹¹⁹ Therefore, a competent confinement nanny usually needs to work seven days a week for a month to ensure that the new mother and the infant can be continuously cared for. Consequently, confinement nannies usually take rest once every 26 days in practice.¹²⁰

If the legislation does not consider such a characteristic of domestic work, but stipulates that homeowners must guarantee that their domestic workers have at least one day off per week, domestic workers who need to provide continuous domestic service for more than one week, such as confinement nannies, will be unable to provide necessary care to homeowners. Homeowners would need to hire another domestic worker to fill the gap if they cannot find other suitable relatives or friends to help them. However, as abovementioned above, such a result would be neither desired for homeowners nor for domestic workers. Such legislation is thus unlikely to be effectively enforced in practice. Therefore, China should allow homeowners and domestic workers to decide the interval of days off when the nature of a type of domestic work requires domestic workers to work continuously for more than one week.

¹¹⁸ Shourong Lan “休息何以成为权利——劳动者休息权的属性与价值探析” 2014(4) Law Review (Why Rest is a Right---the Attribute and Value of Workers' Right to Take Rest), at 91.

¹¹⁹ Li Yang, Mingyao Zhu and Yi Yin “月嫂陪护对婴儿健康影响的调查分析” 2011(18) Journal of Nursing Science (Survey and Analysis of the Influence of Confinement Nannies on Infants), at 87-88.

¹²⁰ Tang, above n 30, at 58; Kou, above n 111, at 64.

Nevertheless, while allowing domestic workers and homeowners to decide the interval can accommodate the character of the continuity of domestic work, domestic workers would not benefit from regular days off to recover their energy if the interval is unreasonably long. Homeowners may also avoid giving domestic workers days off by setting a long interval. They may require domestic workers to work continuously for a long period but terminate the contract before the workers receive their days off. Therefore, China should also stipulate that the interval of days off should be shorter than one month.

(c) Giving domestic workers the right to have days off on national holidays

Domestic workers do not have the legal right to rest on national holidays.¹²¹ The lack of this legal right not only means that domestic workers may miss out on the opportunity to rest on national holidays, but also contributes to their lack of holiday pay when they work on national holidays. In order to make it possible for them to rest on national holidays, this section argues that China should give domestic workers an equal right to rest on national holidays with other workers.

National holidays are especially important to the work-life balance of workers. Unlike weekly or monthly rest days, national holidays are not only opportunities for workers to take rest but also for workers to reunite with their family. Especially for internal migrant workers, who consist of a large proportion of domestic workers,¹²² national holidays can be the only available opportunities for them to go back to their hometowns and reunite with their relatives, because their relatives may also be migrant workers in other cities or provinces. Having the legal right to take rest on national holidays thus allows domestic workers to reunite with their relatives as well as rest.

¹²¹ See Chapter 4.

¹²² See Chapter 2.

Having the right to take a rest on national holidays also contributes to the improvement of the wages of domestic workers. Some domestic workers may be willing to work on a national holiday. For example, local domestic workers may be willing to work on national holidays as their family members live in the same city; internal migrant domestic workers may also be willing to work on national holidays because they do not need to go back to their hometowns on every national holiday. Having the legal right to rest on national holidays gives them the right to receive a payment for unworked public holidays, or to earn a wage at a higher rate if they work on national holidays.

Giving domestic workers the right to rest on national holidays is practical because it does not lead to excessive cost to homeowners. The intention in setting holiday pay is not to encourage domestic workers to work on national holidays, but to give them time off on national holidays. Homeowners can cover their domestic work themselves if they do not want to pay a higher monthly wage to domestic workers. If homeowners still need domestic services on national holidays because they need to work on national holidays, according to the Chinese Labour Law, they can receive a holiday payment of 300 per cent of their normal wage.¹²³ Therefore, the holiday pay of homeowners will be enough to cover the cost of paying holiday pay of domestic workers. In addition, as pointed out in the section on the income of domestic workers, the holiday pay of domestic workers could be lower than the holiday pay rate which is stipulated in the Labour Law. A lower rate can relieve the economic pressure on homeowners, so that those homeowners who have a limited income but have to rely on domestic workers to maintain their basic life can also afford the holiday pay of domestic workers.

(d) Giving domestic workers the right to have a paid annual leave

To ensure adequate rest for employees and improve the morale and motivation of employees, China gives employees the legal right to paid annual leave after they have worked for a

¹²³ The Labour Law of the PRC, above n 55, article 44.

minimum of one year.¹²⁴ Paid annual leave contributes to energy recovery and relaxation of domestic workers following a long period of work. However, domestic workers do not have the legal right to take paid annual leave.¹²⁵ Moreover, the format contract of domestic services which are issued by local public authorities also does not include any paid annual clause for domestic workers. Consequently, the paid annual leave of domestic workers is ignored in practice.

In order to ensure the capability of the domestic worker to enjoy paid annual leave, this section argues that China should include the legal right to paid annual leave under the specific law for domestic workers. Moreover, to facilitate the popularisation and enforcement of paid annual leave for domestic workers, China should not use the approach of determining paid annual leave according to the Regulation on Paid Annual Leave of Employees,¹²⁶ but set a fixed paid annual rate for domestic workers. To be more specific, the legislation for domestic workers should adopt the minimum standard of the paid annual leave in the Regulation on Paid Annual Leave of Employees, which is five days per year. The reasons for this recommendation are outlined hereunder.

Firstly, the lack of any official employment status for domestic workers means that using the accumulated working year of workers to decide the length of the paid annual leave for them is impractical. According to the Regulation on Paid Annual Leave of Employees, periods of paid annual leave of employees is determined in accordance with their accumulated working years. For workers who have worked for more than one year, but less than 10 years, the paid annual leave is five days. Workers who have worked between 10 and 20 years are entitled to 10 days paid annual leave. Workers who have worked for more than 20 years are entitled to 15 days paid annual leave.¹²⁷ The accumulated working year of employees is not the actual year a worker has worked, but the working year when a worker works in a formal employment

¹²⁴ Regulations on Paid Annual Leave of Employees, above n 49, article 1.

¹²⁵ See Chapter 4.

¹²⁶ Regulations on Paid Annual Leave of Employees, above n 49.

¹²⁷ Regulations on Paid Annual Leave of Employees, above n 49, article 3.

relationship.¹²⁸ It means that only working years that have been recorded by the labour authorities can be used to calculate the paid annual leave of workers. However, flexible employment workers, such as domestic workers, do not have any official employment status. Their working years thus cannot be used to calculate the length of their paid annual leave.

Secondly, using the accumulated working years of employees to decide the length of paid annual leave for domestic workers may lead to unfairness among domestic workers. As mentioned above, the accumulated working years of domestic workers do not necessarily reflect their actual working experience. If the paid annual leave of domestic workers was calculated in accordance with their accumulated working years, a worker who has worked for more than 20 years as a domestic worker may receive less paid annual leave than a worker who has just started working as a domestic worker, but had previously worked in a state-owned company for 10 years. Such an approach in calculating periods of paid annual leave of workers would thus be unfair to domestic workers whose working years have not been fully recorded by the labour authorities.

Thirdly, using the existing legislation to determine the length of paid annual leave of domestic workers may also be unfair to homeowners. The accumulated working year of workers includes those where workers have served for all of their employing units.¹²⁹ One of the rationales of giving longer paid annual leave to longer serving workers is to reward the contribution those workers have made to their employing units and to value the experience they have obtained during their long working years.¹³⁰ However, the long working years of domestic workers does not necessarily mean that these workers have better domestic service occupational skills than other domestic workers have. One group of domestic workers is composed of employees of state-owned companies who were made redundant during the

¹²⁸ Ibid, article 4.

¹²⁹ Ibid.

¹³⁰ Lu Wang “我国带薪年休假制度的完善” 2016(21) China Labor (A Study on the Improvement of the Paid Annual Leave in China), at 17.

reform of state-owned companies.¹³¹ These workers may have had long working years in factories or offices, but may have limited experience in domestic services. Therefore, it would be unreasonable to require homeowners to offer longer paid annual leave to domestic workers who are not necessarily as skilled as other domestic workers. Moreover, it is unreasonable to require the next homeowner to bear the cost of rewarding the contribution that a domestic worker has made to their past employers.

In contrast, adopting such an approach would mean that domestic workers, regardless of their accumulated working years, would be given a fixed period of paid annual leave. A fixed period for all domestic workers would thus avoid the impracticality of calculating their accumulated working years and it would not result in unfairness.

In addition, using the lowest standard of paid annual leave stipulated in the Regulation on Paid Annual Leave of Employees promotes the popularisation and enforcement of such a right of domestic workers. The regulation on paid annual leave is not effectively enforced in China.¹³² Companies, especially small and medium-sized enterprises, for the sake of controlling the cost, do not always give their employees any paid annual leave.¹³³ The low level of workers' awareness of their rights and their fear of losing their jobs further contribute to the poor enforcement of the paid annual leave in practice.¹³⁴ The enforcement of such right of domestic workers is likely to be even more difficult than enforcing the paid annual leave of general employees. Providing domestic workers with a high paid annual leave will thus increase the difficulty of enforcing it.

¹³¹ Duoxun Yu “家政工养老保险法律问题研究” 2011(26) *Modern Business* (Research on the Endowment Insurance Plan of Domestic Workers), at 276.

¹³² Libiao Ning “论我国带薪休假权保障立法的完善” 2016 v.33; No.172(2) *Studies in Law and Business* (Legal Recommendation on the Improvement of the Paid Annual Leave in China), at 19.

¹³³ Jing Liu, Na Yun and Yue Ren “带薪年休假调查:人人享有假期任重道远” 2013(5) *Labor Security World* (Survey of the Paid Annual Leave), at 11.

¹³⁴ Ning, above n 132, at 19.

Applying the lowest level of paid annual leave stipulated in the Regulation on Paid Annual Leave to domestic workers can promote the enforcement of such a right because it does not result in an unaffordable burden for homeowners. If a domestic worker has worked full time in a family for more than one year, it generally means the relationship between domestic worker and homeowner is relatively harmonious and stable. Considering the difficulty of finding reliable and trustworthy domestic workers in China, the time and financial cost of finding another suitable domestic worker may be higher than the cost of paying five days of annual leave to these workers.¹³⁵ Homeowners thus will not intentionally dismiss their domestic workers to avoid paying their annual leave, because the cost of paying the annual leave is lower than the cost of finding another suitable domestic worker.

3 Social insurance for domestic workers

This section provides legal reform recommendations on giving domestic workers access to all social insurance plans. As discussed in Chapter Four, currently, domestic workers only have access to endowment insurance and medical insurance among all social insurance plans. Moreover, their enjoyment of the medical insurance plans is hindered by their lack of household registration in the place where they work. Their poor financial status is also detrimental to their enjoyment of endowment insurance and medical insurance.

In order to give domestic workers the capability to access all social insurance plans, this section argues that China should first include the legal right of buying social insurance in the specific law for domestic workers. The lack of a legal right to buy social insurance results in the absence of a legal basis for domestic workers to obtain all the social insurance plans. Stipulating such legal rights of domestic workers clarifies that, although the relationship between domestic workers and homeowners is not a labour relationship, domestic workers are legally entitled to obtain social insurance.

¹³⁵ Liu, above n 102, at 120.

Moreover, China needs to ensure the practicality of enforcing the right of domestic workers to obtain social insurance plans. This section argues that allowing domestic workers to buy social insurance as flexible employment workers is a practical way to give domestic workers access to all social insurance plans but China needs to lift the restriction of household registration on buying social insurance plans and develop an unemployment insurance plan and a work-related injury insurance plan for flexible employment workers.

(a) Guaranteeing the right of domestic workers to buy social insurance as flexible employment workers

This section argues that giving the right of domestic workers the right to buy social insurance as flexible employment workers is a practical approach to give domestic workers the capability to obtain social insurance. As discussed, there are two channels for workers to obtain social insurance in China. One is establishing a labour relationship with an employing unit, and another is buying social insurance as flexible employment workers.¹³⁶ While the employing unit and the employee pay social insurance plans together in the first channel, workers need to complete all procedures and bear all social insurance premiums in the second channel.¹³⁷ The first channel thus appears favourable to domestic workers because homeowners would bear the main portion of the social insurance premiums and complete the application of social insurance for those workers. However, enforcing such an arrangement is impractical because calculating and paying social insurance for domestic workers can be difficult for homeowners. Moreover, this arrangement does not necessarily bring economic benefits to domestic workers in practice, and they may be unable to meet the preferences of the workers.

By contrast, as will be analysed in the following paragraphs, allowing domestic workers to pay social insurance plans as flexible employment workers avoids the impracticalities which could result from stipulating the legal obligation of homeowners to pay social insurance for

¹³⁶ See Chapter 4.

¹³⁷ See Chapter 4.

domestic workers. In addition, it fits in with the informality of domestic work and the irregular relationship between domestic workers and homeowners.

The impracticality of requiring homeowners to pay for the social insurance of domestic workers

In order to ensure the capability of domestic workers to obtain social insurance, the legislation must be practical.¹³⁸ It is not practical to require homeowners to pay for the social insurance of domestic workers, because not all homeowners have the ability to fulfil such a duty. Even if they have, fulfilling such a legal obligation can result in an unreasonable workload for homeowners. In addition, stipulating such a legal obligation for homeowners can conflict with the preference of domestic workers.

Not every homeowner can complete the procedure of applying and paying for the social insurance of their domestic workers. Applying and paying for the social insurance of workers involves calculating the premium and completing the formalities.¹³⁹ While a company can complete these tasks easily, these can be difficult for homeowners to complete independently, especially for homeowners who are disabled or injured, who may even be unable to look after themselves independently, let alone complete the procedures of buying social insurance for domestic workers. Consequently, when homeowners who do not have corresponding ability to fulfil the tasks involving paying social insurance for domestic workers, such a method will not be effectively enforced.

Even if homeowners have the means to apply for and pay for the social insurance of their workers, this can be time-consuming and may lead to an unreasonable inconvenience for those homeowners. The relationship between employer and employee is usually stable. This means

¹³⁸ See Chapter 4.

¹³⁹ For example, according to the Stipulations on Collection and Payment of Social Insurance Premiums (北京市社会保险费征缴若干规定), 04 August 2003, entered into force 01 October 2003, employers need to complete formalities of buying social insurance in several authorities and need to calculate and claim the premiums of their employees.

that the employer only needs to process the payment of social insurance for their employees once a month. However, the relationships between domestic workers and householders are usually unstable. For example, a domestic worker may only work a few hours for a homeowner: but, if the legislation required homeowners to pay social insurance for their domestic workers, the homeowners would need to apply and pay social insurance every time they hire a new domestic worker. Consequently, if homeowners hire a domestic worker for just a few hours to clean their apartment, the formalities that are linked to applying and paying the social insurance of the workers may cost more than the time taken for cleaning the apartment. Homeowners may also need to apply for and pay for social insurance for several domestic workers in one month because of the unstable relationship between the domestic workers and the homeowners. In other words, if the homeowners had a legal obligation to apply for and pay for the social insurance of their domestic workers, hiring those workers would be time-consuming rather than timesaving for homeowners.

Requiring homeowners to pay the social insurance of domestic workers does not necessarily bring economic benefits to those workers. Theoretically, if homeowners had the legal obligation to pay the social insurance for their domestic workers in accordance with the Chinese Labour Law, the homeowners would need to bear the main proportion of the premium of the social insurance of the workers. Domestic workers thus could benefit from such an arrangement economically. However, homeowners can deduct the cost of paying social insurance from the wages of domestic workers. When homeowners hire domestic workers, they must calculate the total cost of hiring them. Therefore, even if homeowners are willing to abide by the legislation and pay the social insurance for domestic workers, they can simply use a portion of the wages of the workers to cover the cost of social insurance. In other words, domestic workers would still bear the cost of the insurance and homeowners would only have a nominal legal obligation to pay the social insurance of domestic workers.

Domestic workers may even prefer homeowners to pay them cash directly rather than paying social insurance for them. Not every migrant worker plans to move his or her family to the

city.¹⁴⁰ Some migrant workers only plan to work in the city for a short period. Once they earn enough money, they will go back to their hometowns.¹⁴¹ These workers may have no intention to participate in endowment insurance for employees because workers need to pay the pension insurance for at least 15 years to become qualified to receive a pension after retirement.¹⁴² Some domestic workers may also prefer other types of social insurance plans, such as pension insurance and basic medical insurance for residents.¹⁴³ Although these social insurance plans have a lower protection level than social insurance for employees, the cost of paying these plans is lower than the cost of paying social insurance for employees.¹⁴⁴ Workers who prefer high income over high social security may prefer social insurance for residents. When the legal obligation of homeowners to pay the social insurance of domestic workers does not meet the preference of domestic workers, they will ask homeowners to pay the social insurance premium to them in cash. Consequently, ordering homeowners to pay social insurance for domestic workers is unlikely to be effectively enforced in practice.

The practicality of allowing domestic workers to buy social insurance as flexible employment workers

Domestic workers do not need to rely on homeowners to obtain their social insurance when they can buy social insurance as flexible employment workers. Allowing them to buy social insurance as flexible employment workers can thus avoid the abovementioned impracticalities

¹⁴⁰ Haiyang Lu “社会保险对进城农民工家庭消费的影响” 2014(4) *Population&Economics* (The Effect on Social Insurance on Household Consumption of Rural-Urban Migrants), at 40; Zhou Jianxin; and Zhou Daming “保姆的群体特征研究:中国东南沿海散工典型个案研究之一” 2007 03(187) *西南民族大学学报* 10 (Study on the Characteristics of Domestic Workers: Day Labourers in Southeast China), at 14; Kaojin Zhu “城市农民工心理研究——对南京市 610 名农民工的调查与分析” 2003(6) *Youth Studies* (Research on the Psychology of Migrant Workers from Rural Areas: a Survey and Analysis of 610 Migrant Workers in Nanjing City), at 10.

¹⁴¹ Jianxin; and Daming, above n 140, at 14.

¹⁴² Na Zhang “进城农民工养老保险参与意愿及其影响因素研究” (Master's dissertation, Huazhong Agricultural University, 2011) (Research on Urban Migrant Worker's Willingness and Factors to Old-age Insurance: Based on the Empirical Research in Wuhan).

¹⁴³ See Chapter 4.

¹⁴⁴ See Chapter 4.

arising from requiring homeowners to buy social insurance for domestic workers. In addition, such an approach can adjust to the unstable income of domestic workers.

Local governments decide the social insurance premium in accordance with the local average monthly wage of employees. While the premium is usually calculated according to the wage of the employee, there is a lower limit and an upper limit to the base of calculating the premium. The lower limit is 60 per cent of the average monthly income of employees over the previous year, and the upper limit is 300 per cent.¹⁴⁵ For example, the average monthly wage of employees in Shanghai in 2017 was 7,132 yuan.¹⁴⁶ Therefore, the lower limit would be 4,279 yuan and the upper limit 21,396 yuan. If an employee in Shanghai received a monthly wage of 4,000 yuan in 2017, this lower limit of 4,279 yuan would be used as a base to calculate his or her social insurance premium.

Unlike the normal working pattern, which generally has stable working days and fixed daily working hours, the working pattern of domestic workers is unstable and can vary from month to month or even from day to day.¹⁴⁷ When domestic workers do not have sufficient working hours, their monthly wages may be lower than the lower limit for paying social insurance. The premium that is paid by homeowners thus would be lower than the minimum premium required by local social insurance authorities. Consequently, when domestic workers do not have enough working hours in a month, they will fail to pay their social insurance premium.¹⁴⁸

¹⁴⁵ Notice on Reducing the Social Insurance Contribution Rate (国务院办公厅关于印发降低社会保险费率综合方案的通知), General Office of the State Council, 01 April 2019, available at http://www.gov.cn/zhengce/content/2019-04/04/content_5379629.htm.

¹⁴⁶ Notice of Matters regarding the Average Wage of Employee in Shanghai in 2017 (关于本市 2017 年职工平均工资有关事宜的通知), Shanghai municipal Human Resource and Social Security Bureau, 23 March 2018, available at: https://www.12333sh.gov.cn/201712333/xxgk/flfg/qtxfw/201805/t20180518_1282332.shtml

¹⁴⁷ Xintong Chen “唐山市家政工人就业状况调查” 2015 27(5) Journal of Shijiazhuang Vocational Technology Institute (Survey of the Employment Status of Domestic Workers in Tangshan City), at 41.

¹⁴⁸ Workers would not be able to use their social insurance plans when they fail to pay it continuously. Moreover, when workers suspend the payment of social insurance, they may be unable to access other social benefits, such as the right to change their household registration, which requires continuous payment of social insurance. See Yanqi Li “社保中断隐患多”断保一族”需谨慎” 2015(12) Human Resource Management (Hidden Dangers of Failing to Pay Social Insurance Continuously).

Allowing domestic workers to pay social insurance as flexible employment workers can avoid such a problem. In months when the wages of domestic workers is lower than the minimum social insurance base, they can either use their savings to pay the insurance premium or apply for unemployment insurance. In either situation, their payment of social insurance will not be interrupted in the months when their wages are lower than the minimum threshold.

Allowing domestic workers to buy social insurance as flexible employment workers also avoids the inefficiency that would be caused by requiring homeowners to pay social insurance for domestic workers. While a labour relationship is established between an employee and an employing unit, a domestic worker can work for several homeowners in the same period. Consequently, if homeowners had the legal obligation to pay the social insurance premium for domestic workers, the social insurance of a domestic worker might need to be paid by several homeowners. In contrast, if domestic workers pay their social insurance as flexible employment workers, they can complete the payment independently. The payment of social insurance for domestic workers thus does not need to be done repetitively by several homeowners.

(b) Clearing legal obstacles that prevent domestic workers from obtaining social insurance

Having the legal right to buy social insurance as flexible employment workers does not guarantee their capability to obtain all social insurance plans. As discussed in Chapter Four, internal migrant worker status of domestic workers restricts their enjoyment of medical insurance. Moreover, the legislation does not give flexible employment workers the right to buy unemployment insurance and work-related injury insurance.¹⁴⁹ Therefore, to guarantee the capability of domestic workers to obtain all social insurance plans, China should clear the obstacles that prevent flexible employment workers from obtaining social insurance. To be more specific, China should lift the restriction of household registration on obtaining social

¹⁴⁹ See Chapter 4.

insurance. China also needs to develop a work-related injury insurance plan and an unemployment insurance plan for flexible employment workers.

Lifting the restriction of household registration on buying social insurance

As discussed in Chapter Four, while domestic workers are theoretically entitled to buy medical insurance, lack of household registration in the place where they work restricts their enjoyment of medical insurance.¹⁵⁰ Although China has developed mechanisms that allow citizens to use their medical insurance in places other than the city where their medical insurance plan is purchased, there are still obstacles that prevent internal migrant workers, especially workers who do not have official employment status, from using their medical insurance in other places.¹⁵¹ These legal and regulatory obstacles could also hinder the enjoyment of unemployment insurance and work-related injury insurance after China develops such insurance plans for flexible employment workers. Therefore, to ensure the capability of domestic workers to obtain all social insurance plans, China needs to lift the restriction of household registration on buying all social insurance plans.

In addition, lifting the restriction of household registration on buying social insurance gives low-income workers access to social insurance. Although internal migrant workers can obtain social insurance in their hometown, a large proportion of these workers only have a limited income which is not enough for them to afford their social insurance premium.¹⁵² In order to give low-income citizens access to social insurance, most local governments subsidise the social insurance premium of low-income citizens. For example, in Shanghai, low-income families who work as flexible employment workers can obtain a 50 per cent discount off their

¹⁵⁰ See Chapter 4.

¹⁵¹ See Chapter 4.

¹⁵² Shuang Wang “农民工社会保险参与意愿及影响因素研究——以河南省新乡市为例” 2017(4) *Journal of China Institute of Industrial Relations* (A Study on the Willingness of Migrant Workers to Participate in the Social Insurance and its Influencing Factors: A Case Study of Xinxiang City of Henan Province), at 48; Shiyong Ai and others “体面就业视角下的农民工社会保障制度创新研究” 2017(s2) *Sichuan Labor Insurance* (Study on the Institutional Innovation for the Social Protection System of Migrant Workers from the Perspective of Decent Work), at 27.

social insurance premiums for up to three years.¹⁵³ This type of subsidy can reduce the financial burden of low-income workers in buying social insurance. However, this type of subsidy issued by local governments is only available to workers who have a local household registration and the requirement to receive such subsidies is decided in accordance with the local economic development level.

Internal migrant workers in big cities usually come from underdeveloped regions. Consequently, while they can be identified as low-income workers in the place where they work, their income can be too high for them to receive subsidy in the place of their household registration. For example, families whose average monthly income is lower than 1,940 yuan can be identified as low-income families in Shanghai. In contrast, the standard for being recognised as a low-income family in Yinchuan¹⁵⁴ is 855 yuan per person per month in urban areas and 475 yuan per month in rural areas.¹⁵⁵ If a migrant family of three members from Yinchuan works as flexible employment workers in Shanghai and this family had a total monthly income of 5000 yuan in 2017, they could be identified as a low-income family in Shanghai because the monthly wage per capita of this family is less than 1,940 yuan. However, they cannot obtain a social insurance subsidy because they can only buy social insurance in their hometown and their income is higher than the standard for being recognised as a low-income family in their hometown.¹⁵⁶ Consequently, although migrant workers can apply for such a subsidy in their hometown, they may be unable to obtain such a subsidy in practice due to the economic development disparity between different regions. Such an arrangement is unfair to these migrant workers because they work and live in the same place as local workers but cannot enjoy a social insurance subsidy when they have a low income.

¹⁵³ Notice from the official website of Shanghai municipal Human Resource and Social Security Bureau, available at https://www.12333sh.gov.cn/201712333/bmfw/msztc/201801/t20180115_1277551.shtml.

¹⁵⁴ Yinchuan city is the capital city of Ningxia Hui Autonomous Region, which is ranked the third worst for GDP volume among all provinces in mainland China. The standard of being recognised as a low-income family in other cities of this Autonomous Region is even lower than the standard of Yinchuan city.

¹⁵⁵ 银川市低收入家庭认定办法政策解读, 银川市民政局, 2018-07-02, available at http://www.yinchuan.gov.cn/xxgk/bmxxgkml/smj/xxgkml_2049/zcjd_2058/201807/t20180702_855098.html

¹⁵⁶ For a three-member family, the total monthly income should be lower than 2565 yuan in urban areas or 1425 yuan in rural areas in Yinchuan.

Therefore, to ensure the capability of flexible employment workers, such as domestic workers, to obtain social insurance, China should lift the restriction of householder registration on buying social insurance.

While it is necessary to lift the restriction of household registration on buying social insurance, abolishing the household registration system to give domestic workers to right to buy social insurance in the place where they work is not practical at least in the short term.¹⁵⁷ The significant development disparity between regions has resulted in a large number of internal migrant workers in China.¹⁵⁸ However, limited social resources in major cities cannot meet the need of all migrant workers and the household registration in China plays an important role in maintaining the stability and development of the country.¹⁵⁹ Inappropriate reform of the household registration system may lead to a negative influence on the development of society. For example, in 2003, Zhengzhou city issued a local regulation that allowed migrant workers to transfer their household registration to Zhengzhou. However, it terminated the regulation in 2005 because enforcement of the regulation had affected the security, stability and economic development of the city.¹⁶⁰ Therefore, China should lift the restriction on household registration for the enjoyment of public services gradually. Instead of abolishing the household registration system, China could first address the restriction on buying social insurance arising from the household registration system.

¹⁵⁷ Yong Fu “户籍改革宜渐进有序--与主张全面取消者商榷” 2005 4(4) *Economist* (The Household Registration Should be Reformed Gradually); Haiying Xiao “关于我国户籍制度改革途径的思考 ” 2006(5) *Zhejiang Social Sciences* (Reform of the Household Registration System in China).

¹⁵⁸ Guanghe Lei and others “中国人口迁移流动的变化特点和影响因素——基于第六次人口普查” 2013 *Northwest Population* (Characteristics and Determinants of the Population Migration in China: Based on the 6th Census of Population); Lei Hu and Shengnan Liu “人口迁移行为规律及其理论进展” 2018 4 *Public Management* (The Inherent Law of the Population Migration and the Development of Population Migration Theories).

¹⁵⁹ Xinhui Lu “论户籍屏障理论正负社会效应及其调控” 2007 40(4) *Journal of Zhengzhou University* (Household Registration System's Positive and Negative Influence on the Society); Wenkai Sun “中国的户籍制度现状, 改革阻力与对策” 2017 5(3) *Studies in Labor Economics* (China's Hukou System: Current Situation, Reform Obstacles and Countermeasures).

¹⁶⁰ Fu, above n 157, at 65.

A potential way forward to address such a problem at the moment is to improve the residential permit system so that domestic workers can obtain a residential permit in practice and use it to buy social insurance in the place where their residence permit is registered. The last chapter mentioned that a few local governments had implemented local regulations that give migrant workers the right to use their residence permit to buy social insurance as flexible workers; however, even in these cities, domestic workers are usually unable to buy social insurance because of the obstacles for them in obtaining a residence permit. To guarantee the right of migrant workers to obtain social insurance, China should not only give residence permit holders the right to buy social insurance plans as flexible employment workers in the place where their permit is registered, but also clear obstacles that prevent migrant workers from obtaining a residence permit.

Developing practical unemployment insurance for flexible employment workers at the national level

Unemployment insurance is developed to guarantee the most basic living expenses of workers and promote re-employment of these workers.¹⁶¹ However, as discussed in Chapter Four, domestic workers do not have access to unemployment insurance due to their lack of official employment status. Nevertheless, these workers have low incomes and poor job security. It means that they have low economic power against the risk of loss of income arising from being unemployment. Therefore, they need unemployment insurance more than standard workers do.

To ensure the capability of domestic workers to obtain unemployment insurance, this section argues that China should develop an unemployment insurance plan for flexible employment workers at the national level. The development of unemployment insurance for flexible employment workers should consider the informal and unstable relationship between flexible

¹⁶¹ The Regulation on Unemployment Insurance (失业保险条例)(China), entered into force 22 January 1999, article 1.

employment workers and their employers. In addition, China should also develop rules to prevent unemployment insurance from being misused by these workers.

Although some local governments, such as Beijing, Yunnan, Nanjing, Guilin, and Harbin have issued local regulations that give flexible employment workers the legal right to buy unemployment insurance, such examples remain rare. Indeed, out of the four first-tier cities in China, including Beijing, Shanghai, Guangzhou and Shenzhen, only Beijing has issued a local regulation that gives flexible employment workers the right to buy unemployment insurance. Similarly, Guangdong province, which has the largest population in China since 2006, have no local regulation giving flexible employment workers the right to buy unemployment insurance. The lack of a national law on unemployment insurance for flexible employment workers means that a large proportion of migrant domestic workers do not have the right to buy unemployment insurance in either the place they work or their hometown. Therefore, to guarantee their capability to obtain unemployment insurance, China should develop a nationwide unemployment insurance plan for flexible employment workers.

Moreover, China should not require flexible employment workers to provide documents that can only be obtained by workers who have established a labour relationship with their employers. The Regulation on Unemployment Insurance stipulates that employing units shall provide workers with a document that proves the termination of their employment relationship and workers need to submit this document to the social insurance authority when they apply for unemployment insurance.¹⁶² Flexible employment workers do not have official employment status. They would not be able to benefit from their unemployment insurance if they had to provide these types of documents.

Furthermore, to ensure the sustainability of unemployment insurance for flexible employment workers, China should prevent the unemployment insurance plan being misused by flexible employment workers. In the few cities where flexible employment workers have the right to buy unemployment insurance, flexible employment workers only need to register their

¹⁶² Ibid, article 16.

unemployment status in the subdistrict office of their household registration when they apply for unemployment benefits.¹⁶³ In other words, local labour authorities grant unemployment benefits to flexible employment workers generally based on their application. While such a method of granting unemployment benefits to flexible employment workers accommodates the fact that they do not have official employment status and thus ensures the right of these workers to obtain their unemployment benefits, it can also lead to the misuse of unemployment insurance by these workers.

For example, according to the Notice on Participation in Unemployment Insurance for Flexible Employment Workers of Kunming city of 2017, in order to obtain unemployment benefits, flexible employment workers only need to register their unemployment status and receive employment guidance and occupational training from local human resources centre during the period of receiving unemployment benefits.¹⁶⁴ Labour authorities are unable to identify the actual employment status of these workers but they grant unemployment benefit based on their application because these workers do not need to provide substantial evidence to prove their unemployment status.

Such an arrangement gives flexible employment workers in Kunming the opportunity to make a profit from buying unemployment insurance. For example, the annual premium for unemployment insurance for flexible employment workers was 518.82 yuan and the monthly unemployment benefit was 1,183 yuan in 2018.¹⁶⁵ The accumulated payment term of

¹⁶³ Ying Li “昆明市灵活就业人员失业保险问题研究” (Master's thesis, Yunnan University, 2011) (Study on Unemployment Insurance of Flexible Employment Workers in Kunming).

¹⁶⁴ The Notice on Participation in Unemployment Insurance for Flexible Employment Workers of Kunming city of 2017(灵活就业人员申请参加2017年失业保险须知), 16 October 2017, available at <http://dianchi.km.gov.cn/c/2017-10-16/1830683.shtml>.

¹⁶⁵ The formula for calculating the unemployment insurance premium for flexible employment workers in Kunming is: Average Annual wage of Employees in Kunming of the Last Year \times 60% \div 12. There is also a service fee of CNY 60 and a filing fee of CNY 0.72. see Ibid. The Average Annual wage of Employees in Kunming in 2017 is 76,350 yuan, therefore, the annual premium for unemployment insurance for flexible employment workers was 518.82 yuan. See the Average Annual wage of Employees in Kunming in 2017 (2017年昆明市城镇非私营单位平均工资), Statistics Bureau of Kunming, 24 April 2018. The unemployment insurance benefit of Kunming City in 2018 was 1,183 yuan.

unemployment insurance determines the duration of the unemployment benefits that could be enjoyed by workers. Generally, as the following table presents, the longer a worker pays their unemployment insurance, the longer they can enjoy unemployment benefits. When the accumulated payment term is longer than six years, every new payment year adds one month to the total period that can be enjoyed by workers. The maximum allowable duration of receiving unemployment benefits is 24 months.¹⁶⁶

Accumulated payment term (month)	Duration of unemployment benefit (month)
12	2
24	4
36	7
48	10
60	13
72	15

(Accumulated payment term and allowable duration of unemployment benefit in Kunming city)

Since flexible employment workers do not need to provide substantial evidence of unemployment when they apply for employment benefits, paying an annual premium of 518.82 yuan in Kunming enables these workers to receive 2,366 yuan, which is the unemployment benefits of two months. The benefit will be even higher when they apply for the unemployment benefit after they have paid unemployment insurance for six years. The premium for 6-year unemployment insurance is 3,122.92 yuan. Paying unemployment insurance for six years enables workers to receive a 15-month unemployment benefit, which is 17,745 yuan. Workers can thus obtain a benefit of 14,622.08 yuan. Such a result is not in

See Adjustment of Unemployment Insurance Benefits in Kunming City (昆明市调整失业保险金标准), 13 June 2018, available at: <http://czj.km.gov.cn/c/2018-06-13/2609395.shtml>.

¹⁶⁶ Ibid.

line with the goal of developing unemployment insurance, which is to guarantee the most basic living expenses of workers and promote re-employment of these workers.

In the context that China has a high surplus of unemployment fund¹⁶⁷ and the coverage of social insurance among flexible employment workers is low¹⁶⁸, the grant of unemployment benefits to these workers without examining the verifying their employment status in a few cities has not resulted in unbearable financial burden on unemployment insurance fund. However, if such unemployment insurance is enforced at the national level, the number of flexible employment workers that would be able to make a profit through buying unemployment insurance plan would be significantly higher. According to the survey conducted by the All-China Federation of Trade Unions, there were 391 million out of 776.4 million workers had established formal labour relationship with their employers in 2017.¹⁶⁹ In other words, 385.4 million workers in China would be able to buy unemployment insurance plan when an unemployment insurance plan for flexible employment workers is developed at the national level. Granting unemployment benefits without verifying the real employment status to such a large number of workers would not only lead to the waste of unemployment insurance fund, but also be detrimental to the sustainability of the unemployment insurance. Therefore, to ensure the sustainability of unemployment insurance at the national level, China should develop mechanisms to prevent unemployment insurance from being misused by workers.

¹⁶⁷ By the end of 2017, the accumulated balance of the unemployment insurance fund in China is 555,237 billion yuan, see the website of the Ministry of Finance of the People's Republic of China, at http://m.mof.gov.cn/czsj/201810/t20181030_3057886.htm.

¹⁶⁸ Only flexible employment workers who have paid the Endowment Insurance and the Medical Insurance can buy the unemployment insurance.

¹⁶⁹ Yubin Li 第八次中国职工状况调查 (China Workers Publishing House, Beijing, 2017) (The Eighth Survey of Chinese Workers); National Bureau of Statistical and Ministry of Human Resources and Social Security *China Labour Statistical Yearbook 2017* (China Statistics Press, Beijing, 2017).

Developing a work-related injury insurance plan for flexible employment workers

Domestic workers are vulnerable to work-related injuries. However, their lack of work-related injury insurance means they need to bear the full cost arising from injuries at work.¹⁷⁰ Having employment status is the prerequisite for obtaining industrial injury insurance in China.¹⁷¹ Paying work-related injury insurance for their employees is a mandatory legal responsibility of employers. While the reason for demanding employing units to pay the work-related injury insurance plan is that employing units have the responsibility of ensuring the safety of working conditions,¹⁷² such an arrangement also deprives the right of flexible employment workers, such as domestic workers, to obtain work-related injury insurance. As a result of lacking work-related injury insurance, domestic workers may be unable to obtain adequate income to maintain their standard of living or even be unable to obtain appropriate medical treatments due to inadequate money when they are injured at work. Therefore, it is necessary to ensure their capability to obtain work-related injury insurance.

To ensure the capability of domestic workers to obtain work-related injury insurance, this section argues that, China should give flexible employment workers a channel to buy this insurance plan. Such an arrangement avoids circumstances where domestic workers cannot obtain adequate compensation because homeowners have not paid their work-related injury insurance. Allowing domestic workers to buy work-related injury insurance themselves is also economically practical because it will not result in unaffordable financial pressure for them. At the same time, China should also include rules that prevent flexible employment workers from using work-related injury insurance to cover other injuries.

Domestic workers can ensure that all of their work-related injuries are covered by insurance when they can buy work-related injury insurance themselves. As mentioned above, the relationship between domestic workers and homeowners can be temporary. Domestic workers

¹⁷⁰ See Chapter 4.

¹⁷¹ See Chapter 4.

¹⁷² Guoying Lyu “工伤保险法律法规的法理基础” 2011(6) China Health Insurance (Jurisprudential Basis of the Legislation on Industrial Injury Insurance), at 24.

may work full time in one family for years, or they may also work just a few hours for one household. When domestic workers work for households for a short period, or even a few hours, such as cleaning the house for a single time, the homeowners may forget to pay it. Moreover, homeowners might not want to pay it because the procedures for paying the insurance for domestic workers can be time-consuming. If homeowners had the duty to pay but did not pay the work-related insurance for domestic workers, according to Chinese the Social Insurance Law, the homeowners would need to bear the costs arising from the injury or death of their domestic workers.¹⁷³ However, homeowners may be unable to provide sufficient compensation to domestic workers due to their limited economic capacity. Even they have, domestic workers may be unable to obtain such compensation due to their limited access to justice. Consequently, domestic workers might be unable to obtain adequate economic compensation when they are injured at work if China required homeowners to pay their work-related injury insurance.

Allowing domestic workers to buy industrial injury insurance directly from the labour social insurance authority can avoid the circumstances mentioned above. When domestic workers are injured at work, they can apply for compensation from the social insurance authority. Therefore, they do not need to rely on homeowners to obtain their work-related injury insurance and do not need to worry if the homeowners have enough economic power to cover their medical expenses arising from injuries at work.

Allowing domestic workers to pay work-related injury insurance themselves will not lead to an unaffordable financial burden for these workers. According to the Classification Form of Industry Injury Risk¹⁷⁴ and the Notice on Adjustment of the Rate of Industrial Injury

¹⁷³ The Social Insurance Law of the PRC (中华人民共和国社会保险法), 28 October 2010, entered into force 01 July 2011, article 41.

¹⁷⁴ The Classification Form of Industry Injury Risk (工伤保险行业风险分类表), the Ministry of Human Resources and Social Security and the Ministry of Finance, 22 July 2015.

Insurance Premium,¹⁷⁵ there are eight rates of industrial injury insurance premium.¹⁷⁶ The rates are based on the work-related injury risk of industries.¹⁷⁷ While the highest rate is 1.9 per cent of the wage of a worker, the lowest rate is 0.2 per cent of the wage.¹⁷⁸ The domestic service industry is classified in the second category, which has a contribution rate of 0.4 per cent of personal wages.¹⁷⁹ Taking the average wage of workers in Shenzhen city as an example, the average annual wage of employees in private companies is 51,423 yuan,¹⁸⁰ or an average monthly wage of around 4285.25 yuan. The average wage of domestic workers may be even lower than the average wage of employees because the majority of domestic workers have a low wage. Nevertheless, even domestic workers have an average of 4285.25 yuan, so the average premium of industrial injury insurance will be only slightly higher than 17 yuan per month, which will not be an excessive economic burden for them.

While China should allow domestic workers to buy work-related insurance as flexible employment workers, they should also include rules that prevent domestic workers from using work-related injury insurance to cover other injuries. Work-related injury insurance is developed to ensure appropriate treatment for injured workers and to compensate for their loss of income due to their injury at work.¹⁸¹ It thus covers all expenses arising from treating work-related injuries, and it provides injured workers or the family members of workers who have died with monetary compensation.¹⁸² As such, the standard of protection provided by work-related insurance is significantly higher than the protection provided by medical insurance,

¹⁷⁵ The Notice on the Adjustment of the Rate of Industrial Injury Insurance Premium (关于调整工伤保险费率政策的通知), the Ministry of Human Resources and Social Security, 22 July 2015, available at: http://www.mof.gov.cn/zhengwuxinxi/zhengcefabu/201507/t20150731_1396669.htm.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ The Classification Form of Industry Injury Risk, above n 176.

¹⁸⁰ Bulletin of the average wage of workers in Shenzhen, Bureau of Statistics of Shenzhen city, 12 June 2016, available at: http://www.shenzhen.gov.cn/cn/xxgk/zfxgj/tzgg/201706/t20170612_6993756.htm.

¹⁸¹ Regulation on Work-related Injury Insurance(工伤保险条例)(China), 27 April 2003, entered into force 01 January 2004, article 1.

¹⁸² Ibid, article 30-40.

which only covers a proportion of medical expenses.¹⁸³ Consequently, workers may use work-related injury insurance to cover their other injuries if they have the opportunity.

Work-related injuries include not only injuries that happen in the workplace and during working hours, but also injuries that happen during working hours but not in the workplace.¹⁸⁴ The latter situations include injuries that happen when workers are on the way to work or on the way back home, or when they leave the workplace to undertake work-related matters.¹⁸⁵ While such a scope of a work-related injury can be used to distinguish work-related injuries from other injuries of workers in a standard labour relationship, such an approach cannot accommodate the ambiguous boundary between working and non-working hours of domestic workers and the informality of domestic work. In particular, for live-in domestic workers, their life is mixed with their work, namely the life of the homeowners.

The lack of such a boundary contributes to the difficulty of social insurance authorities to distinguish the work-related injuries of domestic workers from other injuries. Social insurance authorities may be unable to verify if domestic workers are working for homeowners when they are injured because of the informal and usually invisible relationship between domestic workers and homeowners. For example, if domestic workers are injured when they are buying things for themselves but argue that they are buying things for their homeowners, social security authorities will be unable to identify if their injuries are work-related or not. In other words, domestic workers might claim their non-work-related injuries as work-related injuries if China applies the existing definition of work-related injury to identify the work-related injury of domestic workers. Therefore, China should further clarify the scope of work-related injury of domestic workers so that social insurance authorities can distinguish the work-related injuries of these workers from other injuries.

¹⁸³ The standard of protection provided by medical insurance is determined by local governments. Take the coverage of outpatient medical treatment in Shanghai as an example, for workers who are younger than 44 years old, the medical insurance plan covers 65, 60, or 50 per cent of their medical expenses in level 1, level 2 or level 3 hospitals respectively. There is also an excess of 1500 yuan for these workers.

¹⁸⁴ Regulation on Work-related Injury Insurance, above n 183, article 14.

¹⁸⁵ Ibid.

D Conclusion

This chapter provides legal reform recommendations on the improvement of the precarious status of domestic workers in China. It recommends that China should develop a specific law for domestic workers. Developing a specific law for domestic workers can avoid the impracticalities of using labour protection law or civil law to regulate the relationship between domestic workers and homeowners in China. Developing a specific law for domestic workers also contributes to the development of effective and practical legal protection for domestic workers.

It further argues that China should follow the principle of protection of domestic workers and development of legal protection in accordance with the special characteristics of domestic work, and develop local regulations to supplement the national law for domestic workers. The principle of protecting domestic workers can compensate for the inadequate legal protection arising from an emphasis on the promotion of consumption of domestic services. Developing legislation in accordance with the special characteristics of domestic work can promote the practicality of the legislation. Local regulations not only have the advantage of being developed faster than national law, but they can also facilitate the enforcement of national legislation. Moreover, this chapter provides specific legal reform recommendations to address problems that have been revealed in Chapter Four. The recommendations cover three aspects: income, rest and social insurance of domestic workers. The recommendations introduce how the legislation should be developed to give domestic workers adequate legal rights and to ensure their enjoyment of those legal rights.

VI Chapter 6 Conclusion

This thesis sets out to provide legal reform recommendations to improve the precarious status of domestic workers in China in line with the capability approach. There are more than 20 million of such workers in China, who are typically in precarious work relations because of inadequate legal protection, the informality of their work and their low bargaining power. This thesis analyses legal and regulatory factors that contribute to their precarious employment status and provides legal reform recommendations to improve their precarious status.

Since there are similarities shared by domestic workers around the globe, problems facing domestic workers in China could also exist in other countries, especially in countries where legal protection for informal workers is also insufficient. Therefore, although the understanding of domestic workers outside of China is not emphasised in this thesis, this study can contribute to the identification problems facing domestic workers in other countries.

Moreover, although recommendations that are concluded based on the Chinese social context cannot be used to protect domestic workers in other social contexts, the way of analysing problems facing domestic workers from the perspective of their capabilities could also be used to reveals problems facing domestic workers in other countries. The idea of developing legal protection for domestic workers in accordance with social context could also be used to develop practical legal protection for domestic workers in other countries.

In addition, domestic workers in China and elsewhere are typical precarious workers. This thesis contributes to the literature on the legal rights of precarious workers in China and other countries.

A Summary of chapters

Chapter One explains the importance of changing the precarious status of domestic workers in China and introduces the content and structure of the thesis. It introduces the topic by

showing that giving domestic workers adequate legal protection contributes not only to the improvement of the wellbeing of more than 20 million workers, but also to the homeowners who hire domestic workers, and to the development of the Chinese society as a whole. Moreover, this chapter introduces the theoretical framework, the methodologies, and the structure of the thesis.

Chapter Two explores the definitions and terminology used in the thesis and considers a number of relevant legal concepts specific to the Chinese legal system. The explanations and analysis of these definitions and terminologies pave the way for the analysis of the legal and regulatory factors that contribute to the precarious status of domestic workers.

The first section of this chapter analyses the definition of domestic workers in a way that sheds light on their precarious status. This section compares and contrasts the definition of the domestic worker adopted by the International Labour Organisation Convention with that of Chinese law. It concludes that the definitions adopted by Chinese regulations are too broad to be used to develop legal protection for these workers. Moreover, it clarifies the definition of domestic workers that is used in the thesis. It clarifies that domestic work is work that is not for direct profit and performed in or for households, and domestic workers are any persons engaged in domestic work under the instruction or supervision of households. This section also clarifies that the definition of domestic workers in this thesis does not include workers who engage in domestic work but have an established labour relationship with any other employing units. Although such a definition excludes domestic workers who are employees of domestic service companies, such a definition meets the requirement of researching the precarious status of domestic workers in China because there is only a marginal number of domestic workers have established labour relationships with domestic service companies in China, and these workers are already protected by labour protection law.

The second section introduces the demographic characteristics of domestic workers. Domestic workers are largely internal migrants, typically female, with low educational background, and relatively older workers. The demographic characteristics reveal who domestic workers are in China and explain that their low socioeconomic status contributes to their low bargaining

power.

The third section introduces the legal relationships among domestic workers, domestic service companies and homeowners, and explains why domestic workers are excluded from the Chinese Labour Law. In particular, it introduces the Chinese legal system and explains the differences between labour protection law and civil law in the Chinese legal system. Overall, civil law and labour law are different categories of law. These two categories of law regulate the relationship between parties having equal status and the relationship between employees and employers respectively. Domestic workers in China currently fall within the scope of civil law. As such, domestic workers are unable to obtain a measure of legal protection, in particular in the area of labour protection.

Chapter Three explains who precarious workers in China are and why domestic workers are typically precarious workers. The first section of this chapter introduces the social context of precarious workers in China from the perspective of the emergence of precarious workers. In the past 40 years, China has gone through a radical social transition from a style of the planned economy as seen in the Soviet Union to the current market economy. The Chinese economic evolution has been subjected to its own national and socio-cultural characteristics. The legislation on the protection of workers has also changed radically in line with the social transition. This section analyses the emergence of precarious workers in China from the perspectives of the relationship between employees and employers, the channels for workers and employers to establish labour relationships and the change of the social status of general workers.

The second section uses Kountouris's legal determinants of precariousness¹ as a legal conceptual framework for the analysis of the concept of precariousness in work relations. In particular, these legal determinants of precariousness include immigration status, employment status, income, job stability and organisational control. This section introduces the

¹ Nicola Kountouris "Legal Determinants of Precariousness in Personal Work Relations: A European Perspective, The" 2012 34 Comp. Lab. L. & Pol'y J.

manifestation of the precariousness of workers in Chinese society. Domestic workers are typical precarious workers in China because they usually have several or even all of these determinants of precariousness.

Regarding the precariousness arising from workers' immigration status, this section introduces the connection between the household registration system and the precariousness of internal migrant workers. The household registration system, which is used to decide the distribution of social welfare among Chinese citizens, is the major factor that contributes to the precarious status of workers. After a brief introduction of the Chinese household registration system, this section concludes that migrant workers are suffering from employment discrimination due to their lack of local household registration in the places where they work. A large number of domestic workers are internal migrant workers. Lack of household registration in the place where they work contributes to fewer job opportunities and lower wages for migrant domestic workers than for local domestic workers.

In relation to employment status, this section finds that a large number of workers are in a precarious status because their employment relationship with their employers is disguised as an independent contracting arrangement. The lack of a clear standard to decide the establishment of a de facto employment relationship contributes to this situation. Domestic workers do not have any official employment status because homeowners are not recognised as employers in the Chinese Labour Law. Therefore, the relationship between domestic workers and homeowners is not an employment relationship governed by employment law. Moreover, some domestic workers have established a de facto employment relationship with a domestic service company. Such workers do not have a recognised employment status because their de facto employment relationship is disguised as an intermediary relationship. Furthermore, the limitation on the age of employees means that female domestic workers who are older than 50 or male workers who are older 60 years old cannot establish a labour relationship with domestic service companies.

In relation to income, this section shows that the absence of minimum protection, illegal wage deductions and default, as well as output-related income arrangements contribute to the

income precariousness of workers in China. Domestic workers are especially vulnerable to income precariousness due to lack of legal protection for their wages, their unstable working hours and low job stability.

As regards temporal precariousness, this section shows that workers in China suffer temporal precariousness when their work is inherently temporal or when they lack legal protection on job security. The prevalence of dispatched labour also contributes to the temporal precariousness of workers. Domestic workers have low job security because domestic work is inherently short-term and there is no legislation on the protection of their job security.

In terms of the organisational control of precarious workers in China, this section shows that defective legislation and ineffective enforcement of the legislation contributes to workers' lack of control over their work. In particular, workers may be in a precarious status due to ineffective labour protection, inadequate access to justice or due to lack of a competent trade union to help them in relation to legal support. Domestic workers do not have access to labour inspection and they do not have the right to use labour mediation and arbitration to resolve disputes with homeowners. Although they can use litigation to protect their rights, using litigation to resolve disputes takes a long time and is highly expensive. Litigation thus is not a practical channel for the majority of domestic workers to protect their rights. Even when domestic workers finally win a case, households and domestic service companies can often evade enforcement of the judgement. Although domestic workers have their own trade unions in some cities, these trade unions have limited function in terms of protection of domestic workers. They also have the disadvantage of insufficient financial resources, lack of independence, and limited legal rights to protect the rights of domestic workers.

The analysis in this section reveals that precariousness of domestic workers results not only from inadequate legal protection of domestic workers, but also from the characteristics of domestic work. Therefore, China should not only give domestic workers adequate legal protection but also ensure that legal protection can accommodate the special characteristics of domestic work.

Chapter Four explains how the capability approach is applied in the thesis. Based on Nussbaum's list of central capabilities,² it analyses the inadequate capabilities of domestic workers. Sen's theory of development as freedom is based on the evaluation of the effect of social provision on the improvement of people's freedom.³ By contrast, Nussbaum proposes the constitutional incorporation of desired capabilities.⁴ Nussbaum thus proposed a list of 10 central capabilities.⁵ This chapter argues that such a list improves the normative power of the capability approach and adopting the list of central capabilities to examine and develop institutions for domestic workers contributes to the improvement of their capabilities in China.

In addition, this chapter examines the current legislation applicable to domestic workers and analyses how it has resulted in their inadequate central capabilities. In particular, it illustrates that, while income, rest and social insurance are linked to their central capabilities, legislation in China does not guarantee a stable and sufficient income for domestic workers to afford the most basic living expenses for themselves and their family members, nor enough rest to stay healthy, nor access to all social insurance plans.

Chapter Five provides recommendations addressing the precarious status of domestic workers in three sections. The first section argues that China should develop a specific law to regulate the relationship between domestic workers and homeowners. This section compares the advantages and disadvantages of using three categories of law, civil law, labour law and special law to regulate the relationship between domestic workers and homeowners. It concludes that developing a specific law exclusively for domestic workers is the most suitable approach to develop legal protections for domestic workers because it can accommodate the special characteristics of domestic work, avoid conflicts among laws and regulations, and conform to the custom of using special law to regulate workers who are excluded from the

² Martha C Nussbaum "Poverty and Human Functioning: Capabilities as fundamental entitlements" 2006 *Poverty and inequality*, at 74-75.

³ Amartya Sen "Development as Freedom (Alfred A. Knopf Inc.: New York)" 1999, at 4.

⁴ Martha Craven Nussbaum *Women and human development: the capabilities approach* (Cambridge University Press, New York, 2000), at 70-71.

⁵ Nussbaum, above n 2, at 74-75.

labour protection law.

The second section recommends the adoption of three principles underpinning the development of the legislative process designed to protect domestic workers. Firstly, it recommends that China should adopt the principle of protecting domestic workers. Adopting such a principle can correct the inadequate legal protection for these workers in the existing legislation. Secondly, this section recommends that China should emphasise the special characteristics of domestic work in the legislation for domestic workers. The special characteristic of domestic work implies that applying existing labour protection law to domestic workers does not guarantee their enjoyment of legal protection in practice. Therefore, the legal protection for domestic workers should be developed in accordance with the special characteristic of domestic work. Thirdly, this section argues that China should use local regulations to supplement the national law on the protection of domestic workers. The procedure of developing local regulations is significantly faster than the procedure of developing a national law. Therefore, China could use local regulations to meet the urgent need for legal protection for domestic workers before the adoption of a specific law for domestic workers at the national level. Local regulations could also facilitate the enforcement of national law with rules that accommodate the local social context.

The third section provides specific recommendations on the development of legislation on income, rest and social security for domestic workers. This section provides corresponding legal reform recommendations to address the deficiencies in legislation which have been identified in Chapter Four. The recommendation in this chapter also demonstrates how China should develop legal protection that balances the protection level and the practicality of legal protection for domestic workers.

B Key findings

Adequate legal protection for domestic workers can benefit the development of the domestic service industry in China

The Chinese domestic service industry is experiencing problems, which in particular include the lack of sufficient regulation on domestic service companies, social bias against domestic workers, lack of trust in services provided by domestic workers, and shortage of highly skilled domestic workers. These problems are detrimental to the development of the domestic service industry.

A key factor that contributes to these problems is inadequate legal protection for domestic workers. In particular, insufficient legal protection for domestic workers creates an economic incentive for owners of domestic service companies to run their businesses as intermediaries. However, there is very little regulation from the public authorities over intermediary domestic service companies, and the latter can evade the regulations of the public authorities easily.

Moreover, the lack of legal protection contributes to the lack of occupational training for domestic workers. Inadequate training contributes to the poor occupational skill of domestic workers. The lack of legal protection also means that the personal information of domestic workers does not need to be verified by public authorities, which fosters a fertile environment for illegal or immoral acts. The overall poor occupational skill of domestic workers coupled with the immoral or illegal conduct of some domestic workers contribute to an overall lack of trust in the domestic service industry.

Furthermore, the poor legal protection of domestic workers reinforces the idea that domestic work is not formal work and that the domestic service industry thus cannot attract and maintain highly skilled domestic workers. Therefore, adequate legal protection for domestic workers could benefit the development of the domestic service industry.

The definitions of domestic workers in the current legislation do not capture their common vulnerabilities and cannot be used to delineate their precarious status.

To analyse and provide recommendations for legal reform to address the vulnerabilities of

domestic workers, this thesis firstly clarifies who the domestic workers in China are. However, neither the definition of domestic workers in the legislation at the national level nor the definitions in the local regulations reflect the common disadvantaged status of this group of workers. These definitions are developed with the intention to cover all unregulated commercial activities to the regulation of public authorities. Consequently, these definitions usually include all commercial activities connected with households. For example, they include not only domestic workers but also contractors, such as matchmakers and home removalists, who work in or for a household or households but provide their services independently. Therefore, the definitions of domestic workers in existing legislation are too broad and ambiguous to be used to analyse the precarious status of domestic workers.

The capability approach is a suitable theoretical framework to analyse the inadequate legal protection of workers, and particularly that of domestic workers in China.

Applying the capability approach to analyse the deficiencies in the legal protection for workers in China is in a preliminary stage. Existing research largely uses the fact of whether workers can obtain labour protection as a standard to distinguish whether a worker has adequate legal protection. Although having legal rights is a prerequisite for workers to obtain adequate legal protection, focusing solely on the entitlement of legal rights ignores the enjoyment of legal rights and the diversity of personal preferences. In particular, even if they are given labour protection, domestic workers may be unable to enjoy these legal rights due to the special characteristic of domestic work.

The capability approach emphasises not only the entitlement of legal rights but also, more importantly, the enjoyment of those rights. The analysis of legal protection for domestic workers, underpinned by the capability approach, thus reveals not only the inadequate legal rights for domestic workers but also factors that hinder their enjoyment of legal rights. Similarly, developing legal protection for domestic workers based on their capability not only ensures adequate legal rights for them but also contributes to the development of enforceable legal rights.

The precariousness of domestic workers not only results from their lack of legal protection but is also connected to the special characteristics of domestic work and demographic characteristics of domestic workers

The lack of legal protection for domestic workers contributes to their precarious status. Although domestic workers may be able to obtain adequate legal protection through free negotiation with homeowners, they are usually vulnerable to unfair or even exploitative contracts because of their lower bargaining power.

In addition, the demographic characteristics of domestic workers and special characteristics of domestic work also contribute to the precarious status of these workers. In particular, the migrant worker identity of domestic workers hinders their access to social services and contributes to employment discrimination. Their low overall educational level contributes to their low legal awareness and inadequate ability to protect themselves from infringements. Working in a private household leads to isolation, which increases their vulnerability to infringements and difficulty to obtain sufficient evidence to claim their rights. The inherent short-term work of domestic workers contributes to temporal precariousness. In addition, the informality of domestic work contributes to the insecure relationship between domestic workers and homeowners.

Including domestic workers under the protection of the Chinese Labour Law does not guarantee their legal protection in practice.

The exclusion from labour protection contributes to inadequate legal protection for domestic workers. However, including domestic workers into the protection of the Chinese Labour law does not guarantee their enjoyment of labour protection in practice. The incompatibility of the Chinese Labour Law and the special characteristics of domestic work can be detrimental to the enforcement of the labour protection law. In particular, the Chinese Labour Law cannot accommodate the unpredictable working pattern of domestic work. Factors arising from working in a private household hinder the enforcement of labour protection. Applying labour protection law to regulate the relationships between domestic workers and homeowners may

result in an unreasonable burden on homeowners or even in the disadvantaged status of homeowners. Therefore, although bringing domestic workers under the cover of the Chinese Labour Law could theoretically give domestic workers legal protection, such an approach does not ensure the enjoyment of those legal rights in practice by the domestic workers.

C Recommendations

China should develop a specific law for domestic workers

Developing a specific law exclusively for domestic workers makes up for the lack of legal protection arising from using civil law, and avoids the impracticality of using labour protection law to regulate the relationship between domestic workers and homeowners.

Under civil law, the rights and obligations of domestic workers and homeowners are determined through free negotiation, and public authorities do not interfere with the fulfilment of their contractual rights and obligations. However, free negotiation does not ensure adequate legal protection for domestic workers due to their low bargaining powers and due to their limited access to justice. In contrast, the rules in the specific law for domestic workers could be developed in accordance with the existing inequality between domestic workers and homeowners. China could also stipulate the responsibilities of public authorities regarding the enforcement of legal rights in the specific law for domestic workers. Consequently, China could include adequate legal protection in the specific law for domestic workers.

Although including domestic workers under the existing labour protection law gives them equal legal rights with other workers in theory, such an approach does not ensure the enjoyment of their legal rights in practice because the labour protection law does not cater for the special characteristics of domestic work. Moreover, revising the labour protection law to accommodate the special characteristics of domestic work may result in conflicts among the laws and regulations in the Chinese labour protection law system. In contrast, a specific law developed exclusively for domestic workers could accommodate the special characteristics of

domestic work better than Chinese Labour Law. Moreover, a specific law for domestic workers would be independent of the Chinese Labour Law: using a specific law to regulate the relationship between domestic workers and homeowners thus would not conflict with the laws and regulations in the Chinese labour protection law system.

Although domestic workers may have a lower level of legal protection if China adopts a specific law to protect domestic workers, a specific law for domestic workers would not lead to legal stigmatisation of these workers, but rather increase their social status. Developing a special law to regulate the relationship between domestic workers and homeowners also would not necessarily result in higher costs than using the labour protection law to do so. Therefore, to address the precarious status of domestic workers, China should develop a specific law for the protection of domestic workers.

China should use local regulations to supplement the national law on the protection of domestic workers

Although a national law on the protection of domestic workers can provide unified and comprehensive legal protection for domestic workers, the long and complicated process of developing a new law means that developing a specific law for domestic workers cannot meet the short-term need of legal protection for those workers. In contrast, although local regulation cannot provide comprehensive legal protection for domestic workers due to its low legal hierarchy and limited areas of application, it has a faster development process. Therefore, China could use local regulation to improve the legal protection of domestic workers before it adopts a national law on the protection of domestic workers.

In addition, local regulation could supplement the enforcement of the national law by providing specific standards that cater for local social context. Different social contexts, such as economic development disparity between different regions, mean that a single standard in the national law can hardly accommodate the social context of different regions within China. Therefore, local governments could refine the standards stipulated in the national law in accordance with their local context. These refined standards in the local regulation could thus

facilitate the enforcement of the national law on the protection of domestic workers.

Legal protection on the income of domestic workers should ensure the capability of domestic workers to obtain income adequately and on time.

Domestic workers usually have a low income, and they are vulnerable to illegal wage default and deduction. Therefore, China should develop legal protection to guarantee the most basic living expenses for themselves and their family members, and adequate and timely payment of their income.

Firstly, this thesis argues that China should include domestic workers in the protection of the minimum wage. This will not lead to a substantial increase in their income, but it would correct the exploitative wages suffered many domestic workers in China.

Secondly, to protect domestic workers from illegal wage deduction and default, the thesis argues that China should require homeowners to pay the wage of domestic workers in legal tender. China should also give homeowners financial penalties if they fail to pay the wage of domestic workers sufficiently and timeously. Furthermore, China should require homeowners to give a payslip to domestic workers when homeowners pay wages to domestic workers.

In addition, China should give domestic workers the right to take days off on national holidays. However, to ensure the practicality of this measure, China should consider the fact that homeowners generally have lower economic power than companies have and thus stipulate a lower rate of holiday pay for domestic workers than that stipulated in the Chinese Labour Law.

China should ensure the capability of domestic workers to obtain enough rest to stay healthy.

The daily rest period, holidays and leave of domestic workers are currently determined through negotiation with homeowners because of the absence of legal protection on the rest

period of domestic workers. However, in practice, the rest period of domestic workers is usually decided unilaterally by the homeowners. Domestic workers are thus vulnerable to excessively long working hours. This thesis recommends that China should give domestic workers adequate legal protection on their rest period. Moreover, to ensure the practicality of the legal protection, the development of the legislation on the rest period of domestic workers should consider the flexible working patterns and unpredictable working hours of domestic workers. To achieve these objectives, China should adopt the following measures.

Firstly, to ensure the most basic daily rest of domestic workers, this thesis recommends that China should stipulate a minimum daily consecutive rest period for domestic workers. Chapter Five argues that using a minimum rest period can ensure the most basic daily rest of domestic workers, meet the unpredictable working hours of domestic work and meet the preferences of domestic workers to obtain high income over long rest periods.

Secondly, this thesis recommends that China should give domestic workers the right to have at least one day off per week. To accommodate the unpredictable working hours of domestic work, China should also allow domestic workers and homeowners to negotiate the interval of daily rest. However, to avoid such a right of domestic workers being evaded by homeowners, China should ensure domestic worker take days off at least once per month.

Thirdly, this thesis recommends that China should give domestic workers the right to take paid annual leave in accordance with the lowest standard stipulated in the Regulation on Paid Annual Leave. Applying the lowest standard takes the informality of domestic work into account, avoids the unfairness that may result from using the rule in the existing legislation to determine the length of paid annual leave of employees, and contributes to the acceptance of paid annual leave for domestic workers by homeowners.

Finally, this thesis recommends that China should give domestic workers the right to take days off on national holidays. Chapter Five argues that rest on national holidays is not only an opportunity for domestic workers to recover their energy but also for them to reunite with their family members. Moreover, giving domestic workers the right to take a day off on

national holidays is practical because it will not result in an unbearable cost for homeowners.

China should guarantee the right of domestic workers to buy any social insurance plans as flexible employment workers.

Domestic workers currently do not have any official employment status. They thus do not have a legal basis to buy social insurance for themselves. Moreover, although they have the right to buy endowment insurance and medical insurance as flexible employment workers, in practice, legal or regulatory obstacles hinder their access to these two insurance plans. This thesis recommends that China should stipulate the legal right of domestic workers to buy social insurance under the specific law for domestic workers. Confirming their legal right to buy social insurance provides a legal basis for them to obtain full access to social insurance.

Moreover, this thesis recommends that China should give domestic workers the right to buy all social insurance plans as flexible employment workers, and they should clear legal and regulatory obstacles that prevent these workers from enjoying such a right. Chapter Five argues that demanding homeowners to buy social insurance for domestic workers is impractical because not every homeowner can fulfil such an obligation independently. It also does not necessarily bring economic benefits to domestic workers. In contrast, allowing domestic workers to buy social insurance as flexible employment workers means they do not need to rely on the homeowners to buy social insurance for them. In addition, allowing domestic workers to buy social insurance as flexible employment workers caters for the unstable working patterns of these workers and meets the diversity of personal preferences among them.

To clear the legal or regulatory obstacles that prevent domestic workers from obtaining social insurance in practice, the thesis recommends that China should lift the imposition of household registration on buying social insurance as flexible employment workers, and develop an unemployment insurance plan and a work-related injury insurance plan for these workers.

Chapter Four analysed how household registration of workers limits their access to social insurance plans. China should thus adopt measures to ensure the capability of internal migrant workers to buy social insurance plans in the places where they work. Moreover, Chapter Five explains that workers may misuse the existing unemployment insurance plan for flexible employment workers issued by local governments to their own profit. It also explains that an ambiguous boundary between working and non-working hours of domestic workers may enable them to claim all of their injuries as industrial injuries. Therefore, in the development of these insurance plans on the national level, China should not only ensure the enjoyment of these two insurance plans by these workers but also develop rules that prevent these workers from misusing these two insurance plans.

D Outlook

The research presented in the thesis has opened a number of further research lines that could be explored in the future.

Firstly, future research could cover the enforcement of legal protection for domestic workers. Although legislation that matches the social context can reduce the resistance of enforcement, China must improve its labour protection enforcement mechanisms to guarantee the enforcement of recommendations proposed in this thesis. As discussed in Chapter Three, even workers who are protected by the Chinese Labour Law are facing difficulty to protect their labour rights in China. The enforcement of legal protection for informal workers could be even worse if China does not develop mechanisms to ensure effective enforcement of legal protection for domestic workers. In order to improve the enforcement of legal protection for domestic workers, future studies on enforcement of legal protections for domestic workers could include three areas outlined hereunder.

Future studies could research the development of an organisation specifically designed for protecting domestic workers. As discussed in Chapter Three, trade unions in China can hardly

provide adequate support and protection to domestic workers because of the limitation of the Chinese trade union system and domestic workers do not have a formal employment relationship. An organisation for domestic workers could unify their power, protect their legal rights and give them a channel to obtain useful information. Future studies need to investigate how such an organisation could be established.

Future studies could develop a list of evidence that domestic workers can use to support their claims when they have disputes with homeowners. Due to the inadequacy of labour inspectors in China, the privacy of private houses, and informal relationship between domestic workers and homeowners, it is difficult, if not impossible, to cover domestic workers to the protection of labour inspection. Consequently, the burden of collecting evidence is on domestic workers. Such a list could improve their ability to protect their right. Although it is impossible to formulate a list that covers evidence for all disputes between domestic workers and homeowners, China could at least cover disputes in those common matters, such as wages and working hours. Future studies thus could analyse what type of evidence should be included in the list.

Future studies could cover the development of dispute resolution mechanisms for domestic workers. As discussed in Chapter Three, the current dispute resolution mechanism cannot guarantee domestic workers' full access to justice. Not all domestic workers have access to credible and affordable mediation or arbitration. Moreover, the high cost and lengthy process of litigation mean that it does not ensure the access to justice of domestic workers. Therefore, China could consider developing a mediation or arbitration mechanism to resolve disputes between domestic workers and homeowners. As mentioned in Chapter Four, some cities have started experimenting with these mechanisms, but these mechanisms are only available in a few cities. It means that most of the domestic workers do not have access to these channels. Future studies could analyse that how could these mechanisms be improved and be adopted in the national legislation.

Secondly, future research could cover other aspects of the legal protection of domestic workers and refine the recommendations in this thesis. This thesis only covers income, rest

and social insurance of domestic workers. While adequate legal protection on these three aspects contributes to the alleviation of their precariousness, other factors, such as lack of access to justice and limited function of trade unions, also result in the precariousness of domestic workers. Future research could thus extend the scope of research to legal protection on other aspects.

Although the thesis endeavours to provide specific legal reform recommendations on the protection of domestic workers, the recommendations in the thesis do not include detailed enforceable standards. For example, this thesis recommends that China should develop an overtime wage rate for domestic workers and such a rate could be lower than the overtime wage rate stipulated in the Chinese Labour Law; however, it does not provide a specific rate. Future research could focus on developing enforceable standards through quantitative research on domestic workers.

Thirdly, future research could cover the effect of non-legal factors on the enforcement of legislation. This thesis focuses only on legal and regulatory factors that contribute to the precarious status of domestic workers. However, while developing legislation that accommodates the special character of domestic work can contribute to the enforcement of their legal rights, non-legal factors, such as a legal awareness of domestic workers and availability of pro bono legal assistance, also influence the enforcement of the legislation. Therefore, future research could cover non-legal factors that affect the enforcement of legal protection for domestic workers.

Finally, future research could analyse and improve the precarious status of other workers in China. Chapter Three of this thesis discusses the fact that there is a large number of precarious workers in China. The number of these precarious workers is increasing along with the rise of the online platforms and the so-called “gig economy”, where employment is often informal and temporary. These workers share many similarities with domestic workers. They usually do not have access to labour protection. Even if they have employment status, these workers, such as dispatched workers, may work on temporary contracts or in insecure employment relationships. Future research could thus draw experience from the research on domestic

workers in this thesis. For example, future research could investigate if it is necessary to develop a specific law for these workers in China and how legislation should be developed to ensure their central capabilities.

E Conclusion

This thesis has analysed legal and regulatory factors that contribute to the precarious status of domestic workers and provided legal reform recommendations to improve their precarious status. Empowering these workers with legal protection is likely not only to contribute to the improvement of their standard of living but also to facilitate the function of the domestic service industry in the development of Chinese society generally. Therefore, China should provide domestic workers with adequate legal protection. However, domestic workers in China are excluded from the Chinese Labour Law and there is currently no specific law on the protection of domestic workers.

In order to change their precarious status, China should not only provide them with adequate legal rights but also ensure that legal protection can accommodate the special characteristics of domestic work. However, the analysis of the legislation applicable to domestic workers from the perspective of the capability approach reveals that domestic workers do not have adequate legal rights. There are also legal and regulatory factors that hinder their enjoyment of their limited legal rights in practice.

The recommendations provided in this thesis provide a way forward for the development of legal protection for domestic workers in China. Developing a specific law for domestic workers only contributes to the development of adequate and practical legal protection for them. Although the recommendations in the thesis only covers the income, rest period, and social insurance of domestic workers due to the limited scope of a PhD thesis, the way of incorporating the special characteristics of domestic work in the legal rights for domestic workers could also be used to develop legal protection of domestic workers in other matters.

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